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No. _____

IN THE

Supreme Court of the United States

October Term, 1988

NORTHSIDE SANITARY LANDFILL, INC.,
Petitioner,

v.

LEE M. THOMAS, AS ADMINISTRATOR OF, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals improperly concluded that one subject to federal agency action must be cognizant of all decisions directed at it which are both published in the Federal Register and unpublished; and must detail by the time for filing for reconsideration all objections later raised upon judicial review, where the EPA did not serve its response to the entity's written comments, the EPA's regulation eliminated the APA § 553(e) right of reconsideration, the statute does not limit review to specific objections, and no adjudicatory hearing is allowed.

2. Whether the Court of Appeals improperly concluded that a site proposed for the National Priorities List (NPL) under the National Oil and Hazardous Substances Contingency Plan must raise all of its objections with specificity prior to judicial review where the statute neither limits review to objections raised with specificity nor permits an adjudicatory hearing; where the statute and regulation provide for only "informal comments"; and where the EPA provided no reconsideration process under a statute requiring judicial review within ninety days of the final rule.

3. Whether the EPA's Final Rule promulgating its Update to the NPL and the Court of Appeals' prior decision upholding EPA's Hazard Ranking System preclude listing a site which consists of regulated units of an unabandoned facility having interim status under the Resource Conservation and Recovery Act (RCRA).

4. Whether the Court of Appeals failed to apply the proper standard of judicial review by concluding that it would have denied Northside's appeal on the merits where the EPA obviously failed to comply with several requirements of its Hazard Ranking System and where all scientific evidence contradicts EPA's crucial determinations regarding the number and discontinuity of groundwater aquifers.

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LEE M. THOMAS, AS ADMINISTRATOR OF, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Northside Sanitary Landfill, Inc.,[1] by counsel, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Northside Sanitary Landfill v. Thomas and EPA*.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia in *Northside Sanitary Landfill v. Thomas and EPA* (Slip Opinion at App. A., *infra*, A-1 through A-11 is reported at 849 F.2d 1516 (1988).

The related opinion of the Court of Appeals for the Seventh Circuit in *Northside Sanitary Landfill v. Thomas* regarding

[1] NSL, Inc. is not a subsidiary of any other corporation, is an Indiana corporation and has its business located five miles from Zionsville, Indiana.

the applicability of the Resource Conservation and Recovery Act to Northside is reported at 804 F.2d 371 (1986). (App. G, *infra*, A-19 through A-46 is the Slip Opinion.)

The related Entry and Memorandum opinion issued on April 12, 1988, by the U.S. District Court for the Southern District of Indiana in *United States v. Northside Sanitary Landfill* in Cause No. IP 88-172C, (App. H, *infra*, A-47 through A-60) establishes the unabandoned status of the Northside facility.

The determination finally placing Northside on the National Priorities List is an amendment by the Environmental Protection Agency to the National Oil and Hazardous Substance Contingency Plan (App. I, *infra* A-61), and it and the relevant EPA Preamble provisions (App. L, *infra*, A-65 through A-72) were originally reported at 49 Fed. Reg. 37070 through 37090 on September 21, 1984.

The related Order of the Court of Appeals for the District of Columbia in *Northside Sanitary Landfill v. Ruckelshaus*, Cause No. 83-2258, dismissed without prejudice Northside's initial appeal from the EPA's proposed rule to list NSL which was published on September 8, 1983, at 48 Fed. Reg. 40674-40682.(App. F, *infra* A-17)

JURISDICTIONAL SUMMARY

This Petition for Writ of Certiorari filed pursuant to jurisdiction granted by 28 U.S.C. § 1254 is an appeal from a Judgment entered on March 25, 1988, by the Circuit Court of Appeals for the District of Columbia (App. B, *infra*) which dismissed an appeal from a rulemaking decision by the Administrator of the United States Environmental Protection Agency ("EPA") placing Northside Sanitary Landfill, Inc. ("NSL") on the National Priorities List ("NPL") under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9657. The Administrator's Final Rule was promulgated on September 21, 1984, as 40 CFR Part 300 which amended Appendix B and the National Oil and Hazardous Substances Contingency Plan

under Section 105 of CERCLA. (App. D,*infra*) It was published at 49 Fed. Reg. 37070 *et seq.* NSL filed an Appeal and Petition for Review with the Circuit Court of Appeals for the District of Columbia on November 30, 1984, pursuant to exclusive jurisdiction granted by 42 U.S.C. § 9613(a). Having granted NSL until forty-five days from issuance of its opinion to file its petition for rehearing, the Circuit Court entered Orders on August 31, 1988, denying Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc.* (App. G and H, *infra*)

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 553(b), (c) and (e) of the Administrative Procedure Act, 5 U.S.C. § 553, regarding notice-and-comment rulemaking provide:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. . .
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title [5 USCS §§ 556 and 557] apply instead of this subsection.
>
> (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.
>
> (Sept. 6, 1966, P. L. 89-554 § 1, 80 Stat. 383.)

Section 105 of CERCLA, 42 U.S.C. § 9605(a), provided in its relevant part regarding Revisions and Republications:

> Within one hundred and eighty days after December 11, 1980, the President shall, after notice and opportunity for public comments, revise and republish the national contingency plan for the removal of oil and hazardous substances, originally prepared and published pursuant to section 1321 of Title 33, to reflect and effectuate the responsibilities and powers created by this chapter.

Section 105 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9605(c), provides in its relevant part regarding revisions to the Hazard Ranking System:

> (1) REVISION—Not later than 18 months after the enactment of the Superfund Amendments and Reauthorization Act of 1986 and after publication of notice and opportunity for submission of comments in accordance with section 553 of title 5, United States Code, the President shall by rule promulgate amendments to the hazard ranking system in effect on September 1, 1984.

EPA's Preamble to its Final Rule promulgating Update I to the National Priorities List published at 49 Fed. Reg. 37070, at 37080 and 37081 (1984), provided in its relevant part regarding EPA's adopted procedure against administrative reconsideration:

> EPA believes that the current approach of scoring by EPA or the States, EPA quality assurance review, public comment on the scoring, and EPA review of the comments provides adequate safeguards against incorrect site scores.(App. L,*infra*, A-71)

* * *

> In addition to the foregoing reasons, other considerations justify the current position not to rescore sites after final listing. These considerations apply not only to cleanup situations but also to situations where a score might be affected by new information about a site or by detection of an error in the original calculations. The process established by EPA for developing the NPL is comprehensive, involving initial scoring, public proposal, consideration of public comment, re-

examination of data and scores, final score calculation, and inclusion on the final NPL. Given this level of scrutiny, and the time and expense involved in scoring sites, EPA finds it necessary to rely upon the interested public to identify factors pertinent to HRS score in a timely manner. EPA believes that it is appropriate to consider inclusion of a site on the final NPL to end the scoring process. (App. L, *infra*, A-72)

The EPA Preamble to the Update I amending 40 CFR Part 300, Appendix B (Hazardous Priorities List) to include NSL contains the following agency interpretation precluding the listing of RCRA Sites, at 49 Fed. Reg. 37074 (September 21, 1984):

As stated in EPA's previous NPL rulemaking (48 FR 40658, September 8, 1983), both CERCLA and the Resource Conservation and Recovery Act (RCRA) contain authorities applicable to hazardous waste facilities. These authorities overlap for certain sites. Accordingly, where a site consists only of regulated units of a RCRA facility operating pursuant to a permit or interim status, it will not be included on the NPL but will instead be addressed under the authorities of RCRA except as provided in the paragraph that follows. The Land Disposal Regulations under RCRA (40 CFR Parts 122, 260, 264, and 265) gives EPA and the States authority to control active sites through a broad program which includes monitoring, compliance inspections, penalties for violations, and requirements for postclosure plans and financial responsibility. RCRA regulations require a contingency plan for each facility.The regulations also contain ground water protection standards.

* * *

Given this alternative authority to ensure cleanup, regulated units of RCRA facilities generally are not included on the NPL. If the facility is abandoned or lacks sufficient resources and the RCRA corrective action requirements cannot be enforced, EPA will consider listing the site on the NPL for possible response under CERCLA. This policy is applicable not only to sites subject to EPA-administered hazardous waste programs but also to sites in States that administer programs approved by EPA.

Section 2.0 to Appendix A to 40 CFR Part 300 entitled "Uncontrolled Hazardous Waste Site Ranking System: A User's Manual" provides in its relevant part regarding mandatory data:

> Use of the HRS requires considerable information about the facility, its surroundings, the hazardous substances present, and the geological character of the area down to the aquifers that may be at risk. . . .
>
> Where there are no data for a factor, it should be assigned a value of zero. . . .
>
> Using the guidance provided, attempt to assign a score for each of the three possible migration routes. Bear in mind that if data are missing for more than one factor in connection with the evaluation of a route, then you must set that route score at 0 (i.e., there is no need to assign scores to factors in a route that will be set at 0).

Section 3.5 of Appendix A to 40 CFR Part 300 of the Uncontrolled Hazardous Waste Site Ranking System provides in its relevant part regarding assigning ground water values for "Distance to Nearest Well/Population Served":

> *Distance to nearest well* is measured from the hazardous substance (not the facility boundary) to the nearest well that draws water from the aquifer of concern. If the actual distance to the nearest well is unknown, use the distance between the hazardous substance and the nearest occupied building not served by a public water supply (e.g., a farmhouse). If a discontinuity in the aquifer occurs between the hazardous substance and all wells, give this factor a score of 0, except where it can be shown that the contaminant is likely to migrate beyond the discontinuity.
>
> *Population served by ground water* is an indicator of the population at risk, which includes residents as well as others who would regularly use the water such as workers in factories or offices and students. . . The well or wells of concern must be within three miles of the hazardous substances, including the area of known aquifer contamination, but the

"population served" need not be. Likewise, people within the three miles who do not use water from the aquifer of concern are not to be counted.

STATEMENT OF THE CASE

The EPA Administrator initially placed Northside ("NSL") upon the proposed Update I to the National Priorities List ("NPL") under CERCLA on September 8, 1983. 48 Fed. Reg. 40674. This Federal Register publication did not contain the EPA's scoring documents related to Northside. NSL submitted to EPA on January 26, 1984, its 422 pages of Comments consisting of scientific written data and views opposing its proposed listing. (J.A. below at 514) The Administrator on September 21, 1984, issued by publication as a Final Rule an Amendment to the National Oil and Hazardous Substances Contingency Plan, National Priorities List, which finally placed NSL on the NPL. 49 Fed. Reg. 37070-37090. (App. I. *infra*, A-61) Also during September, 1984, EPA issued without publication its Support Document wherein it discussed NSL's Comments, but left unchanged the prior score for this facility under the Hazard Ranking System ("HRS"). (J. A. below at 455) The Final Rule omitted publishing this Support Document, and nothing in the administrative record shows it to have been provided by EPA to Northside. (App. L, *infra*, A-67)

NSL had originally sought judicial review of the September 8, 1983, proposed rule by filing a petition with the Court of Appeals on December 7, 1983. This appeal was dismissed by the Circuit's Order of March 28, 1984, upon the Joint Motion to Deconsolidate and to Dismiss. (App. F, *infra*, A-17) In this motion the Government agreed that the dismissal "shall be without prejudice to Northside Sanitary Landfill, Inc. to file a new petition for review, if and when EPA finally amends the National Priorities List under Section 105 of [CERCLA] so as to finally add petitioner's facility to that list." (Record in No. 83-2247, D.C. Cir.)

On November 30, 1984, NSL did file with the Court of Appeals a Petition for Review of the September 21, 1984, Final

Rule, pursuant to jurisdiction exclusively granted to the District of Columbia Circuit by 42 U.S.C. § 9613(a). Because of the pendency of the Circuit's first review of EPA's Hazard Ranking System in *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 905 (D.C. Cir. 1985) and 822 F.2d 132 (D.C. Cir. 1987), the Circuit Court deferred briefing and consideration of the NSL Petition for Review.

Northside Sanitary Landfill, Inc. ("Northside" or "NSL") presently operates a landfill near Zionsville, Indiana, and had provided sanitary and hazardous waste disposal services for Indianapolis and Boone County, Indiana. It presently continues to provide sanitary disposal for nonhazardous refuse. (App. H, *infra*, A-48) Northside was in existence for many years prior to the passage of the Resource Conservation & Recovery Act (RCRA), 42 U.S.C. §§ 6901-6991. On November 18, 1980, Northside submitted a Part A application to EPA for a hazardous waste treatment and disposal permit. As part of its application materials, Northside included a hand-drawn scale map of its facility. This map delineated five areas within Northside's property boundary comprising approximately 134 acres.

On June 9, 1982, the EPA Region V Administrator at Chicago acknowledged that Northside's application qualified it for RCRA interim status. On January 26, 1983, the Region V Administrator requested that Northside submit a Part B application by July 29, 1983. NSL filed a Part B application, but on April 30, 1984, NSL informed Region V that it was "official[ly]" withdrawing its Part B application. Nevertheless, on July 25, 1984, the Region V Administrator issued a notice of his tentative decision to deny Northside's permit application on the grounds that the application was deficient, did not adequately provide for the protection of groundwater, and that other "continuing environmental violations" had occurred.

At the subsequent informal public hearing, EPA stated that Northside's Part B application did not include closure information regarding the areas of its facility for which interim status had been granted. In response, Northside stated that the

Region V Administrator had incorrectly considered its Old Farm Area (forty acres) as part of Northside's permit application. Northside maintained that it had sought a permit for a 303 acre-feet disposal capacity, that this was to be located only in the East Farm Area (thirty acres), and that only twelve acres had actually been used for the treatment and disposal of hazardous wastes.

On October 12, 1984, the Region V Administrator denied Northside's Part B application and terminated its interim status on the ground that a final administrative disposition had been made of Northside's permit application. The Region V Administrator stated that hazardous waste had been disposed of after November 19, 1980, in the Old Farm Area as well as the East Farm, and thus concluded that "[t]he entire hazardous waste landfill area outlined in the November 18, 1980, Part A application must be closed. This includes the 'Old Farm Area.'" The order required Northside to commence immediate closure proceedings under the applicable Indiana regulations.

On November 8, 1984, pursuant to 40 CFR 124.19, Northside petitioned the Administrator for review of the Region V order. Northside claimed both before the Administrator and before the Seventh Circuit that on January 4, 1985, the Region V Administrator submitted drawings to the EPA Administrator which inaccurately depicted the areas that Northside had requested EPA consider for a hazardous waste management permit.

On April 3, 1985, the Administrator issued an order denying Northside's petition for review of the Region V Administrator's denial of Northside's hazardous waste application. The Administrator did, however, state that the questions Northside raised regarding the areas within the (1) facility that were encompassed by its Part A and Part B permit applications and (2) that could properly be closed, addressed two of:

> the most rudimentary pieces of information that go into a proper permit decision. If the permit decision does not identify where the facility is located, or how big it is, the permit

> decision cannot be implemented successfully regardless of the outcome of the decision. This is particularly apparent in the present case, for either including or excluding the Old Farm Area will significantly alter the area of Petitioner's landfill that is subject to the closure and postclosure requirements of the regulations.

The Administrator concluded that although the sort of issue Northside raised was within the ambit of 40 CFR § 124.19, Northside "has not sustained its burden of showing that the permit determination is either clearly erroneous or involves an exercise of discretion or policy which warrants discretionary review."

On April 19, 1985, Northside filed a Motion to Reconsider with the Administrator, arguing that the issue as to whether the Old Farm Area is a part of the Part A interim site and subject to RCRA closure was presently being litigated before the Indiana Environmental Management Board. On July 2, 1985 (within the ninety day review period from the Order of April 2, 1985) Northside filed a petition for review with the Seventh Circuit. On November 27, 1985, a few days before EPA's brief was to be filed with the Seventh Circuit, the Administrator denied Northside's motion for reconsideration. However, the Seventh Circuit found that the "Administrator adopted a completely different rationale 'by holding that' Indiana had been granted authority pursuant to 42 U.S.C. § 6926 to conduct closure proceedings for interim status permits." *Northside Sanitary Landfill, Inc. v. Thomas*, 804 F.2d 371, 375-377 (7th Cir. 1986). (App. G, *infra*, A-29)

The Seventh Circuit found "it is clear that the parties were not given a full and fair opportunity to litigate the issue," noting EPA "allotted only five minutes to comment." (App. G, *infra*, A-38) However, the Circuit held that it was withholding judgment on this issue raised in NSL's appeal because it appeared that the state procedure would provide NSL the due process hearing which EPA had denied it on issues of RCRA closure. (App. G, *infra*, A-45) The Seventh Circuit also held that Final EPA action on NSL's RCRA application did not occur until the issuance of the Administrator's Order on Recon-

sideration. (App. G, *infra*, A-30) Thus, NSL held interim status until November 27, 1985.

Although the State of Indiana was proceeding with RCRA enforcement, EPA continued with its activities under CERCLA and issued a Record Of Decision in September, 1987. This "ROD" included the future covering of the entire NSL facility with a multilayer cap described by EPA as a "RCRA Cap." *United States v. Northside Sanitary Landfill, Inc.*, Cause No. IP88-172C (S.D. Ind. 1988). (App. H, *infra*, A-48) In March 1988, the United States obtained an immediate evidentiary hearing on its motion to enjoin Northside from conducting any further landfilling operations on its property. The U.S. District Court in its Memorandum Opinion held that "while the danger posed by the *possible* release of CERCLA substances from Northside may be *minimal*, the EPA has shown that there is a reasonable basis to believe there may be a release of such substances from the site at some future date." (App. H, *infra*, A-54) The District Court denied the Government's motion and summarized that "nothing in the record illustrates that the EPA's current plan for closure will be delayed in any way by defendants continued operation of a sanitary landfill." *United States v. Northside*, (S.D. Ind. 1988) (App. H, *infra*, A-59)

REASONS FOR ALLOWING THE WRIT

Congress by legislating the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") mandated EPA to revise the National Contingency Plan ("NCP") to include a system to prioritize releases or threatened releases nationally for remedial action and to list the priority sites and update the list annually. Congress granted the Circuit Court of Appeals for the District of Columbia exclusive jurisdiction nationwide to review any regulation promulgated for those purposes. 42 U.S.C. 9613(a). *Northside Sanitary Landfill v. Thomas* (App. A, *infra*, A-1 through A-11) is one of a handful of opinions rendered by the Court of Appeals since 1985 which involves the listing of a facility on the National Priorities List ("NPL") pursuant to EPA's Hazard Ranking System ("HRS"). (App. M, *infra*, A-73 through A-79) Because of the large number of waste disposal

sites which were and are being rated under the HRS for possible future inclusion on the NPL, the present case is extremely important and has ramifications affecting many other potential NPL sites.

The D. C. Circuit's *Northside* Opinion written by U.S. District Court Judge Kaufman (who was sitting by designation) should be reviewed because it is directly contrary to the previously leading opinion in *City of Seabrook, Texas v. U.S. EPA*, 659 F.2d 1349 (1981). Therein the Fifth Circuit (1) refused to "accept the EPA's argument that Petitioners should be barred from raising any objection not raised during the 'notice and comment period,' " and (2) refused to accept the "rule urged by EPA [which] would require everyone who wishes to protect himself from arbitrary agency action not only to become a faithful reader of the notices of proposed rulemaking published each day in the Federal Register, but a psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated."

Secondly, the District of Columbia Circuit's opinion has decided an important question of federal law misapplying this Court's decision in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), as well as the Circuit's own decisions in *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 394 (1973) and *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (1977), *cert. denied*, 334 U.S. 829 (1977). These decisions only require detailed objections to agency rulemaking decisions during the administrative process where either the statutes precluded judicial review of objections not specified or allowed an adjudicatory hearing, not where the statute, as here, provided for only informal notice and comment rulemaking.

Thirdly, the Circuit Court by its dismissal has in effect decided incorrectly an important question of federal law as the Circuit with exclusive federal jurisdiction, which question has not been, but should be, settled by this Court. The Circuit's dismissal has allowed EPA to place upon the National Priorities List under CERCLA a "RCRA-Related Site" which is

not abandoned and which held RCRA interim status when EPA issued the final rule for its listing. This action is contrary to EPA's own interpretation of the relationship between the CERCLA and RCRA statutes as set forth in the Preamble to the Final Rule listing Northside, and is contrary to the D.C. Circuit's original opinion that the NPL is for "inactive hazardous waste sites." *Eagle-Picher v. EPA*, 759 F.2d at 905, 922 (1985).

Fourthly, the Circuit Court by denying the appeal without consideration on the merits has refused to require EPA to follow its own HRS which this Circuit upheld in 1985 in *Eagle-Picher Industries v. EPA*, 759 F.2d 905 at 919-922. The Circuit has allowed the EPA to ignore its regulation requiring the assigning of a scoring value of 0 where support data is lacking and not documented, its regulation requiring a score of 0 where a discontinuity in the aquifer occurs between the hazardous substance and all wells, and its regulation precluding from consideration people within three miles of the aquifer who do not use water from the aquifer of concern. Because all of the evidence in the administrative record, including EPA's groundwater study, revealed the aquifer discontinuity, the Circuit Court's opinion has incorrectly determined an important question of federal law as the Circuit of exclusive national jurisdiction, which has not been, but should be settled by this Court. It has also failed to correctly apply the leading decision of this Court in *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*, 435 U.S. 519 at 549 (1978), requiring that a finding not sustainable on the administrative record must be vacated and remanded.

1. Congress Has Not Imposed Upon Those Selectively Chosen For Agency Action The Duty To Read Daily Notices Of Proposed Rulemaking Published In The *Federal Register*, And Certainly Has Not Imposed The Duty To Become Aware Of Agency Responses Never Transmitted Nor Even Published By The Agency.

In the leading case *City of Seabrook, Texas, supra*, at 1360, the Fifth Circuit addressed the precise issue determined by the D.C. Circuit panel, but instead concluded:

> [W]e cannot accept the EPA's argument that petitioners should be barred from raising any objection not raised during the "notice and comment" period. The EPA made the same argument in a case it has failed to cite to us, and the argument was rejected by Judge Hill, then a district judge. *Dobbs v. Train*, 409 F.Supp. 432, 434-35 (N.D. GA 1975), *aff'd* sub nom. *Dobbs v. Costle*, 559 F.2d 946 (5th Cir. 1977). While *Dobbs* was an action to review an agency denial of benefits pursuant to the challenged rule, and this action is one for direct review, we agree with Judge Hill that the courts should not generally hold a petitioner estopped from objecting to an agency rule because his specific objection was not made during the "notice and comment" period.[17] The rule urged by EPA would require everyone who wishes to protect himself from arbitrary agency action not only to become a faithful reader of the notices of proposed rulemaking published each day in the *Federal Register*, but a psychic able to predict the possible changes that could be made in the proposal when the rule is finally promulgated. This is a fate this court will impose on no one.

In its supporting footnote 19, the Fifth Circuit concluded:

> We note that Congress has attempted to impose such a fate, albeit with some escape clauses, in § 307(d)(7)(B) of the Clean Air Act, 42 U.S.C. § 7607(d)(7)(B). The EPA concedes, however, that § 307(d) does not apply to the approval or disapproval of implementation plans.

Completely contrary to this decision in *City of Seabrook, Texas*, the D.C. Circuit concluded that NSL had been given sufficient notice because its name and the date upon which the comment period closed were published in the *Federal Register*. (App. A, *infra*, A-5) The D.C. Circuit went even further by concluding NSL had failed to exercise its statutory right under 5 U.S.C. § 553(e) to request EPA to reconsider and amend its final rule *after* NSL received EPA's response to NSL's Comments, but had instead incorrectly instituted judicial review to attack its inclusion on the NPL. (App. A, *infra*, A-6) The importance of this second conclusion is set forth at page 10 of the Circuit's Slip Opinion where it found that NSL should have

been more specific as to why and how it thought its 422 page submittal of "written data" and scientific "views" were relevant to the scoring, stating (App. A, *infra*, A-10):

> We are not suggesting that Northside should have commented in great detail on every study, but we do conclude that Northside could and should have done far more than it did do to alert the EPA to its positions, which would have *then required* and allowed the EPA fully to consider Northside's version of the facts, and to act upon them appropriately.[11](emphasis added)

In its supporting footnote 11, the Circuit elaborated as follows:

> [11] At the very least, Northside itself could have pointed out those facts which it believed that the EPA had overlooked in the EPA's *response to* Northside's comments. Specifically, *when* Northside *received* the *EPA's response* to its comments, it was on notice that the EPA had not interpreted those comments as Northside evidently expected the agency would. At that point, pursuant to 5 U.S.C. 553(e), *see* note 8, supra, Northside was free to petition the EPA to reconsider its position concerning those comments in the light of the *specific objections* which Northside *now* raises before this court. See *Wisconsin Electric*, 715 F.2d at 327-28. However, Northside did not take advantage of that *opportunity*. (emphasis added)

Firstly, the applicable APA § 553(e) requires the commentor to submit only "written data, views, *or* arguments," and not to submit specific positions.

Secondly, EPA never provided NSL with its response to NSL's Comments, and it never even notified NSL that it had developed such a response which it designated as the Support Document for the Final Revised NPL.

Thirdly, EPA made it impossible for NSL to exercise its right to reconsideration under § 553(e) by not providing for any reconsideration procedure in its Final Rule and by stating such a petition would be an effort in futility, even though this section of the APA statute provided:

> Each agency *shall* give an interested person the right to petition for the issuance, amendment, or repeal of a rule. (emphasis added)

Although the Circuit Court also concluded that "[i]t is certainly incumbent upon the EPA under 5 U.S.C. § 553(c) to 'respond in a reasoned manner to *significant* comments received,'" citing *United States Satellite Broadcasting Company, Inc. v. FCC*, 740 F.2d 1177, 1188 (D.C. Cir. 1984); it went on to say that "the 'dialogue' between administrative agencies and the public 'is a two-way street,'" citing *Home Box Office*, 567 F.2d at 35 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). Dialogue cannot be a two-way street (1) where EPA merely publishes in the *Federal Register* a proposed rule naming NSL on the NPL and requiring comments within 60 days; (2) where NSL submits its comments consisting of both scientific written data and views allowing the EPA eight months to review and respond; but (3) where EPA fails to transmit to NSL or even to publish its written response, which was not issued until it promulgated its final NPL Update rule. EPA instead chose to publish only five lines of reference to this mandatory Support Document which it buried in its thirteen pages of Preamble to the Final Rule of eight pages which it merely published in the massive Federal Register. The Circuit concluded NSL broke down the two-way street dialogue by not asking for reconsideration from a response never received and by not pointing out to EPA that it had misinterpreted NSL's Comments, when in fact EPA never provided NSL with its response *even after* issuing its Final Rule.

EPA's actions from the beginning both eliminated the two-way dialogue contemplated by the rulemaking process of § 553(b) and (c) of the APA, and eliminated NSL's right under § 553(e) to petition for reconsideration of the Final Rule. EPA established a procedure where comments from an affected party are required to be filed with EPA, but no EPA response to those comments are returned to the affected party and where no reconsideration will be considered. EPA's Preamble to this Final Rule provided:

> The process established by EPA for developing the NPL is comprehensive, involving initial scoring, public proposal, consideration of public comment, reexamination of data and scores, final score calculation, and inclusion on the final NPL. Given this level of scrutiny, and the time and expense involved in scoring sites, the EPA finds it necessary to rely upon the interested public to identify factors pertinent to HRS score in a timely manner. EPA believes that it is appropriate to consider inclusion of a site on the final NPL to end the scoring process. (App. L, *infra*, A-72)

The Circuit's opinion places an impossible burden upon a party not only affected by, but individually named in an agency decision. It fails to recognize that EPA would not change its Final Rule once published. This Final Rule reflects that EPA had established no process for reconsideration.

Thus, EPA's Final Rule specifically omitted the right to reconsideration mandated by § 553(e) of the APA. At this point NSL's only remedy was to raise its objections to the D.C. Circuit Court in a petition for review which 42 U.S.C. § 9613(a) required to be filed within 90 days of the issuance of the Final Rule.

Even where a statute requires the filing of objections and precludes issues not so specifically raised with the agency, which is *not* the procedure established under CERCLA and the NCP, the D.C. Circuit itself previously has concluded: "The critical inquiry is whether the objections made before the Board were adequate to put the Board on notice that the issue might be pursued on appeal," and that "the standard requires a close factual inquiry." *Consolidated Freightways v. NLRB*, 669 F.2d 790, 794 (D.C. Cir. 1981). More recently, Judge Wald writing for the D.C. Circuit in *American Maritime Association v. United States*, 766 F.2d 545, 566, n.30 (D.C. Cir. 1985) stated:

> At least in the absence of an explicit statutory directive, the general rule is ultimately a matter of judicial discretion and will not be applied to perpetuate unfairness to the parties.

Under these facts, it was not only unfair, but also inconsistent with § 553(c) and (e) for the Court of Appeals to deny NSL's

appeal on the basis that NSL should have more specifically pointed out and argued its objections and positions to EPA upon the non-receipt of EPA's response to NSL's Comments which contained both scientific "written data" and "views" thereon. The CERCLA statute did not specifically require the exclusion of objections not detailed and summarized for EPA as did the Clean Air Act, and EPA never bothered to transmit its "dialogue" response to NSL.

2. Judicial Review Is Not Precluded As To Issues Not Raised As Specific Arguments Or Summarized To The Agency Unless The Statute Contains Such A Preclusion Or Unless The Process Entails An Adjudicatory Hearing.

The Supreme Court does not preclude judicial review of issues not raised as specific objections or as detailed arguments during an administrative rulemaking process which allows only comments from interested parties, unless the statute requires the exclusion of such issues or provides the party with an adjudicatory hearing process. *Portland Cement Ass'n.*, *supra* (1973), relied upon by the Circuit Court, involved the Clean Air Act which precluded the raising of issues not specifically raised as objections to the EPA. The Fifth Circuit in *City of Seabrook, Texas*, *supra* at 1360, n.17 and 19, found in 1981 that "the EPA has cited no authority for the proposition that an argument not raised during the comment period may not be raised on review," because *Seabrook* did not involve the Clean Air Act as did *Portland Cement*.

The Fifth Circuit found in 1981 that its own research had uncovered only one case "lending some support to the proposition that a party may be estopped from raising an argument on direct review if he failed to raise it during the rulemaking proceeding." But it noted that *Gage v. AEC*, 479 F.2d 1214, 1217-19 (D.C. Cir. 1973) "involved a statute which entitled interested persons to become 'parties' and get a 'hearing' on their objections, and which granted the right of direct review only to such 'parties.' "

The D.C. Circuit relied upon, but misapplied, this Court's 1978 decision in *Vermont Yankee*, *supra*. The Supreme Court in

Vermont Yankee precluded the raising of an alternative to nuclear power plant fuel disposal where the intervenor had failed to submit *either* specific contentions *or* evidence to evaluate the alternative. To the contrary, NSL submitted 422 pages of scientific "written data and views" on groundwater aquifers and quality. In *Vermont Yankee*, *supra*, at 554, this Court noted that the NRC "continually invited further clarification of Saginaw's contentions," *and* "even without such clarification it indicated a willingness to receive evidence on the matters." To the contrary, during the eight months between the filing of NSL's 422 pages of scientific data and views and the issuing of EPA's Final Rule, EPA requested nothing.

Most importantly, *Vermont Yankee*, *supra*, at 526-527, involved a licensing process where parties could raise contentions during adjudicatory hearings under the Atomic Energy Act. Northside could only participate in the EPA described "*informal* notice and public-comment rulemaking" procedures. (EPA Brief below, D.C. Circuit at p. 14) The CERCLA and NCP sections dealing with NPL listings do not allow adjudicatory hearings, nor do they require the exclusion of objections and arguments not raised with specificity during the agency comment period. Thus, the Circuit Court panel should have adopted the Fifth Circuit's opinion in *City of Seabrook, Texas*, *supra*, and the similar review standard established by the D.C. Circuit *en banc* in *Ethyl Corporation v. U.S. EPA*, 541 F.2d 1, 34, *cert. denied*, 426 U.S. 941 (1976); in *Maryland People's Council v. FERC*, 761 F.2d 780, 785 (1985); in *American Maritime Association v. United States*, 766 F.2d 545, 566 (1985) and in *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 905, 921 (1985). This Circuit held *en banc* in *Ethyl Corporation*, *supra*, at 34:

> This is not to say, however, that we must rubber-stamp the agency decision as correct. To do so would render the appellate process a superfluous (although time consuming) ritual.

In its third opinion issued in *Eagle-Picher Industries v. EPA*, 822 F.2d 132 (1987), the Circuit denied review regarding the "population using an aquifer" on the basis that the respon-

dent had never identified to EPA the *data* relied upon and because the record supported EPA's finding. To the contrary NSL submitted 422 pages of written data and views, including the EPA sponsored 1983 Hydrogeological Study Report.

Also, in *Washington Association For Television and Children v. FCC*, 712 F.2d 677 (1983), the D.C. Circuit Court held: "Moreover, it is not always necessary for a party to raise an issue, so long as the Commission, in fact considered the issues." Although the D.C. Circuit strongly criticized Northside for not filing its Comments with the EPA until January 31, 1984, "despite the November 7, 1983 deadline," (App. A, *infra*, A-5) EPA's Preamble to this Final Rule states that "EPA considered all comments received by March 30, 1984." (App. L, *infra*, A-66) Where EPA admits it considered the written comments filed by a party and where the statute neither requires specific objections nor allows an adjudicatory hearing, the Circuit Court cannot dismiss an appeal which is required by statute to be filed within ninety days of the issuance of the final rule, on the basis that the agency was not fully apprised of the specific issues being controverted and the arguments by the commenting party.

EPA's Final Rule of September 21, 1984, did not even include an effective date, but stated it would publish a *Federal Register* notice at the end of a congressional review period and announce the effective date for this NPL Update. No such subsequently published effective date has been discovered, and EPA Headquarters is unable to determine this date. Therefore, the D.C. Circuit Court of Appeals should have at least granted the review, reversed the placement of NSL on an NPL Update having no effective date, and remanded this matter to the EPA, including the requiring of a process where an affected and named party can petition for reconsideration under § 553(e) of the APA.

Indeed, the Circuit's previous Order preserved NSL's right to judicial review of its Final Rule listing. NSL originally appealed its proposed listing upon the NPL on December 7, 1983. The D.C. Circuit dismissed that appeal by Order issued

March 28, 1984, upon the Joint Motion to Deconsolidate and to Dismiss. (App. F, *infra* A-17) The Justice Department and EPA agreed that:

> The dismissal of the petition for review at No. 83-2258 shall be without prejudice to Northside Sanitary Landfill, Inc. to file a new petition for review, if and when EPA finally amends the National Priorities List under §105 of [CERCLA] so as to finally add petitioner's facility to that List.

Nevertheless, EPA subsequently argued successfully to the Court of Appeals panel that NSL is barred from raising any issues whatsoever in its second petition for review timely filed within 90 days after EPA finally added NSL to the NPL.

In summary, it would have been impossible for NSL to have pointed out in a petition for reconsideration to EPA that it had misinterpreted NSL's written comments where EPA's response to those comments was not developed as a Support Document for the Revised NPL until the final rule was promulgated. (J.A. below at 455 and 988 and Certified Index to the Record, p. 37) If EPA did not comprehend how the scientific written data and views submitted by NSL affected the scoring, it should have so advised NSL during the eight months between the filing of these comments and the promulgation of the Final Rule, as did the Atomic Safety Board in *Vermont Yankee*, *supra*, at 554. Instead EPA agreed to a dismissal of the original Petition for Review and to the filing of a second petition two months after NSL filed its data and views.

3. A Court Must Reverse An Administrative Decision Where The Agency Has Failed To Comply With Its Own Published Policy And Interpretation Of Congressional Intent To Exclude A Particular Type Of Facility From The National Priorities List.

During 1986 EPA argued to the Seventh Circuit Court of Appeals that NSL was a RCRA-related site and should be required to proceed through RCRA closure of its entire 134-acre facility, but with the state of Indiana making the final

determinations because of recent delegation of EPA's authority. (App. G, *infra* A-37; and EPA's Brief to the Seventh Circuit, p. 64, n. 34) Nevertheless, EPA has proceeded much farther than simply listing Northside on the NPL. In September 1987 it issued a Record of Decision ("ROD") under CERCLA which included requiring the construction of a multilayer cap to cover Northside and which EPA denominated as a "RCRA cap." *United States v. Northside Sanitary Landfill, Inc.* (App. H, *infra*, A-48)

After the adoption of the EPA regulation on Land Disposal Corrective Actions on July 26, 1982, and even after January 26, 1983, which EPA has argued as their effective date,[2] EPA headquarters advised U.S. Senator Quayle that "active disposal sites such as Northside Landfill are regulated through RCRA" with enforcement by Indiana. (J.A. below at 345) In a contemporaneous letter to U.S. Senator Lugar, EPA's Administrator stated: "It is EPA policy to use our compliance authorities under RCRA to address such sites and conserve superfund resources for those inactive *and* abandoned facilities where no other resources can be brought to bear."

This EPA advocated policy was evidently adopted by the D.C. Circuit in its first opinion wherein it reviewed the Hazard Ranking System. In *Eagle-Picher v. EPA*, 759 F.2d at 922, the Court held: "CERCLA was designed to address the growing problem of inactive hazardous waste sites throughout the United States." Indeed, even both the proposed rule and the Final Rule to Update I to the NPL recognized that it was an improper construction of the CERCLA and RCRA statutes to place a RCRA-related facility on the NPL. (App. K, *infra*, A-63 through A-64; and App. L, *infra*, A-69 through A-70)

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[2] Apparently for the purpose of making these RCRA requirements enforceable against hazardous waste facilities which had opted out of accepting RCRA waste by January 26, 1983, as had Northside, Congress subsequently made the Land Disposal Corrective Actions retroactive to a RCRA interim status facility which "receives hazardous waste after July 26, 1982." 42 U.S.C. § 6925(i) as amended by the Hazardous and Solid Waste Amendments of 1984 (Pub. L. 98-616, Nov. 8, 1984).

EPA's Preamble to the Final Rule as set forth more completely in the Statutory section and App. L, *infra*, provides in part:

> As stated in EPA's previous NPL rulemaking (48 FR 40658, September 8, 1983), both CERCLA and the Resource Conservation and Recovery Act (RCRA) contain authorities applicable to hazardous waste facilities. These authorities overlap for certain sites. Accordingly, where a site consists only of regulated units of a RCRA facility operating pursuant to a permit or interim status, it will not be included on the NPL but will instead be addressed under the authorities of RCRA except as provided in the paragraph that follows.
>
> * * *
>
> Given this alternative authority to ensure cleanup, regulated units of RCRA facilities generally are not included on the NPL. If the facility is *abandoned or* lacks sufficient resources *and the RCRA corrective action requirements* cannot be enforced, EPA will consider listing the site on the NPL for possible response under CERCLA. This policy is applicable not only to sites subject to EPA-administered hazardous waste programs but also to sites in States that administer programs approved by EPA. (emphasis added)

Quite simply, NSL held interim status until November 27, 1985, and RCRA Section 3008(h) provided for "interim status corrective action orders." 42 U.S.C. 6928(h). The Seventh Circuit in *Northside v. Thomas*, 804 F.2d 371 at 378 (1986) (App. G, *infra*, A-30) determined that NSL's RCRA status was not finally determined until November 27, 1985. Nowhere was Northside classified as a "non-regulated unit" not subject to such corrective actions when the NPL Update was finalized on September 21, 1984. Indeed, in its Brief to the Seventh Circuit in *Northside v. Thomas*, *supra*, EPA stated on January 27, 1986 that: "Since it is conceded that hazardous waste was disposed of somewhere on the facility after November 19, 1980, as a legal matter the entire facility became subject to RCRA coverage." (EPA's Brief, Cause No. 85-2119, 7th Circuit, p. 64)

Thus, as a matter of Circuit law and of EPA policy interpreting Congressional intent, the D.C. Circuit was required to

reverse the Administrator's placement of Northside on the NPL Update of September 21, 1984. Not only was NSL then operating and holding RCRA interim status, but even as late as April 12, 1988 the U.S. District Court for the Southern District of Indiana denied the Government's attempt to create an abandoned facility by permanently enjoining all landfilling operations at Northside. (App. H, *infra*, A-59)

4. The Circuit Court's Opinion Constitutes The Granting Of A Degree Of Judicial Deference To An Agency Equaling A Rubber-Stamp Of A Decision Which Is Contrary To The Regulatory Requirements Of The Hazard Ranking System And To The Record Evidence.

In *Ethyl Corporation v. U.S. EPA*, *supra*, at 34, the D.C. Circuit held *en banc:*

> This is not to say, however, that we must rubber-stamp the agency decision as correct. To do so would render the appellate process a superfluous (although time-consuming) ritual.

The Circuit's Opinion in *Northside* is contrary to its *Ethyl Corporation* decision as well as its more recent decision in *Maryland People's Council v. FERC*, *supra*, at 785, wherein it held that it should inspect the record to determine whether an agency decision was based upon consideration of the relevant factors and whether there has been a clear error of judgment. In one of the few other cases interpreting the Hazard Ranking System ("HRS"), the D.C. Circuit held that under the arbitrary and capricious standard it should "look to see if the agency has examined relevant data and has articulated a rational explanation of its action." See *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d at 921. There must be a "rational connection between the facts found and the choice made." See *Salt River Project v. United States*, 762 F.2d 1053, 1058 (D.C. Cir. 1985). Nevertheless, the Circuit panel in *Northside* concluded that if it had addressed the merits, there would exist ample support in the record for this NPL listing. (App. A, *infra*, A-11) It disregarded the obvious agency deficiencies.

Section 2.0 of the HRS requires for its application:

> Use of the HRS requires considerable information about the facility, its surroundings, the hazardous substances present, and the geological character of the area down to the aquifers that may be at risk. . . .
>
> Where there are no data for a factor, it should be assigned a value of zero. (App. M, *infra* A-76)

Discussing the importance of documented data to support values assigned during the HRS scoring, EPA's Director of Emergency and Remedial Response stated in his May 12, 1983 "Guidance for Update in the National Priorities List" that:

> It is essential that the documentation records contain a clear explanation of the sources of information. Please ensure that each information item is supported by a document or other identified source according to a specific title, date, person, or event as appropriate. (See J.A. below at 360)

Because no data was cited in the Documentation Record for the subfactor of Groundwater Use which was assigned the maximum value, the scoring for NSL violated this HRS requirement as approved by the D.C. Circuit in *Eagle-Picher* I, *supra*. Secondly, due to the lack of this mandatory documentation, it was also improper to assign the maximum score for "Distance to Nearest Well" and a high score for "Population Served" by groundwater wells within a 3-mile radius. The combination of these two values alone resulted in 30 of the 39 points assigned to NSL for Groundwater Targets.

Thirdly, the Target score was contrary to both the HRS rule and the record data. HRS Section 3.5 provides that:

> If a discontinuity in the aquifer occurs between the hazardous substance and all wells, give this factor a score of 0, except where it can be shown that the contaminant is likely to migrate beyond the discontinuity.
>
> * * *
>
> Likewise, people within three miles who do not use water from the aquifer of concern are not to be counted. (App. M, *infra* A-79)

The HRS requires a minimum score of 28.5 points to list a site. The State scored NSL at 46 points, but this required a mismatch of aquifers contrary to the HRS rules and to all evidence. Without such a mismatch, the Targets factor would have reduced the total Groundwater Route score to 6.12 and the HRS site score to no more than 3.98. This mismatch involved the "aquifer of concern" which EPA determined was located between the depth of 40 feet and 200 feet *below* the surface (J.A. below at 110) and a surficial water table aquifer which EPA's own experts concluded was between only a depth of 5 to 15 feet below the ground surface. (J.A. below at 529) Although the State EPA scored groundwater for an "observed release," the only documentary support for such a release was water analyzed from a monitoring well within the shallow surficial water table aquifer. (J.A. below at 394 and 151-202)

To support this inaccurate score and the aquifer mismatch, EPA argued to the Circuit that only two aquifers exist at the NSL site, with the first being from the ground surface to approximately 40 feet, and the second being at a depth of 40 feet and below. Nothing in the record supports such a scientific theory. EPA argued to the Circuit panel in its Brief below at pp. 46 and 48.

> However, short of conducting a full hydrogeologic investigation — something never contemplated for the PA/SI stage of the CERCLA review and cleanup process — it is impossible to have 100 percent certainty as to the exact geologic conditions beneath the Northside site.
>
> * * *
>
> By contrast, there was no accepted assumption about a second confining layer, and there was sufficient evidence in the record to provide a reasonable basis for a judgment that there was not a second confining layer between the surface and 40 feet.

The Government did represent to the Circuit Court that "[i]f it had been EPA's judgment that a second confining layer did in fact exist within the shallow aquifer zone, EPA would have

discounted wells beneath it for the purpose of population counts." (EPA's Brief below at p. 48)

The record contains a site hydrogeological study by a Purdue University geosciences engineer, a study by the State environmental agency's Chief of Geology/Chemistry, a geological/groundwater evaluation by a national environmental engineering firm, and even a Hydrogeological Study Report dated August 22, 1983, and prepared by EPA's own consultants. All four study reports conclude that three rather than two aquifers exist and that a confining layer exists between the surficial water table aquifer and the two deeper ones. EPA's consultants concluded:

> Three aquifers occur at different elevations and appear to be fairly continuous under the site. These are:
>
> (1) A Water Table Aquifer, approximately 5 to 15′ below ground surface.
>
> (2) A Shallow *Confined* Aquifer, approximately 20 to 30′ below ground surface.
>
> (3) A Deep *Confined* Aquifer, approximately 150 to 165′ below ground surface. (J.A. below at 529, emphasis added)

Thus, EPA's (1) conclusion that a release observed in the shallow water table aquifer can be matched to the groundwater Target of the "aquifer of concern" *below* a 40-foot depth, (2) conclusion that no confining layer exists between them, and (3) conclusion that only two rather than three aquifers exist; are each contrary to all the record evidence. "If the finding is not sustainable on the administrative record made, then the Comptroller's decision *must be* vacated and the matter remanded to him for further consideration." *Vermont Yankee*, 519 U.S. at 549 (1978). The HRS scoring of the NSL site was done on May 23, 1983, but the EPA Hydrogeologic Study was issued three months *later*. NSL provided EPA with a copy of its report eight months *prior* to the promulgation of the Final Rule on September 21, 1984.

Although the Circuit panel held that NSL in its comments to EPA did not clearly point out its positions and arguments against EPA's scoring, NSL identified EPA's Hydrogeologic Study Report in its transmittal letter. (J.A. below at 575) Although this EPA Report consisted of 138 pages, including the boring data and attachments, its text was only seven pages and even stated under its "CONCLUSIONS" section:

> Two confined aquifers were identified in sand and gravel zones beneath the ECC site. The deep aquifer occurs at a depth of about 155 to 165 feet below ground surface and just above the top of rock surface. A shallow aquifer occurs at about 20 to 30 feet below ground surface. A thick glacial till sequence of hard silty clay and clayey silt separates the two. The upper aquifer appears to be confined by a silty clay layer. (J.A. below at 534; emphasis added)

EPA scored this factor at 30 which gave NSL three-fourths of its score for Groundwater Targets, even though the HRS required that "if a discontinuity in the aquifer occurs between the hazardous substance and all wells, give this factor a score of 0." This was contrary to the record evidence and to the requirements of EPA's HRS. At the time the Final Rule was issued, four separate hydrogeologic study reports submitted by NSL in its Comments concluded that three aquifers existed and that the deeper two were confined and discontinuous from the shallow water table aquifer having an onsite observed release. This included an EPA study prepared three months after the State's site scoring in May, 1983.

Thus, EPA obviously issued a decision contrary to its own HRS requirements and to all scientific evidence.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 14, 1988 Decided June 28, 1988

No. 84-1586

NORTHSIDE SANITARY LANDFILL, INC.

v.

LEE M. THOMAS, ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY, and
U.S. ENVIRONMENTAL PROTECTION AGENCY

Petition for Review of an Order of the
Environmental Protection Agency

Warren D. Krebs for petitioner.

Lawrence E. Blatnik, Attorney, Department of Justice, with whom *Roger J. Marzulla*, Acting Assistant Attorney General, and *Francis S. Blake*, General Counsel, *Mark Greenwood*, Assistant General Counsel, and *Lawrence E. Starfied*, Attorney, Environmental Protection Agency, were on the brief, for respondents.

Before: ROBINSON and SENTELLE, *Circuit Judges* and KAUFMAN,* *Senior District Judge.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Opinion for the Court filed by *Senior District Judge* KAUFMAN.

KAUFMAN, *Senior District Judge*: Petitioner, Northside Sanitary Landfill, Inc. (Northside), seeks review of an order of the Environmental Protection Agency (the EPA or agency) which placed a hazardous waste site owned by Northside on the National Priorities List (NPL), and thereby made the site eligible for Superfund-financed remedial action pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-57 (1982 & Supp. III 1985).[1] We have jurisdiction to re-

---

* Of the United States District Court for the District of Maryland, sitting by designation pursuant to 28 U.S.C § 294(d).

[1] The description of CERCLA set forth in this opinion contains those principles essential to an understanding of this case. We have already commented extensively with regard to what Judge Starr has aptly termed the "complex web of 'Superfund' legislation." *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 922, 925 (D.C. Cir. 1985) (*Eagle-Picher II*). The three *Eagle-Picher* decisions of this court provide a useful introduction to the background, interpretation, and application of the Superfund legislation. *See Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 905 (D.C. Cir. 1985) (*Eagle-Picher I*); *Eagle-Picher II, supra; Eagle-Picher Industries, Inc. v. EPA*, 822 F.2d 132 (D.C. Cir. 1987) (*Eagle-Picher III*).

After the events which are the subject of this petition occurred, Congress amended CERCLA, enacting the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613. Those amendments were intended to "revitalize the Superfund program." H.R. Rep. No. 253(I), 99th Cong., 2d Sess. 54, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2835, 2836. Most of SARA went into effect on October 17, 1986; however, some of SARA's provisions did not become effective until January 1, 1987. *See* 42 U.S.C. § 9601 note. As part of SARA, Congress redesignated the "Hazardous Substance Response Trust Fund"

view that EPA order, *id.* § 9613(a), and, for the reasons stated below, deny Northside's petition for review.[2]

I. Background

This case arises out of the EPA's continuing attempts to comply with the requirements of CERCLA, legislation "designed [by Congress] to address the growing problem of inactive hazardous waste sites throughout the United States." *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 922, 925 (D.C. Cir. 1985) (*Eagle-Picher II*). "To enable EPA to respond to those sites most urgently in need of cleanup, EPA is required under . . . [CERCLA], 42 U.S.C. § 9605(8)(B), to compile the National Priorities List ("NPL") of releases or threatened releases" of hazardous substances across the country. *Id.* at 926. In order to pay for the cleanup of the sites, Congress created a fund known as the "Hazardous Substance Response Trust Fund," or, as it is commonly called, the "Superfund." 42 U.S.C. § 9631; *Eagle-Picher II*, 759 F.2d at 926 n.1.

In deciding whether a given site belongs on the NPL, the EPA employs the "Hazardous Ranking System" (HRS), a scientific model designed to determine the relative hazard which that site presents. The EPA "applies the HRS to data from an observed or potential release [of hazardous waste] to obtain a 'score' or estimate of the risk from the release. The EPA then relies on HRS

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as the "Hazardous Substance Superfund," repealed 42 U.S.C. § 9631, and relocated the substance of that provision in the Internal Revenue Code, 26 U.S.C. § 9507.

SARA does not affect the listing status of the hazardous waste site owned by Northside. Except as otherwise indicated in this opinion, we refer to the provisions of CERCLA which were in effect at the time the Northside site was listed on the NPL.

[2] We entered an Order granting judgment for the EPA on March 25, 1988, and noted in that Order that this opinion would follow.

scores to determine which [sites] should be listed on the NPL." *Eagle-Picher I*, 759 F.2d at 910 (footnote omitted). A score of 28.5 or more leads to the inclusion of the site on the NPL. *Id.* at 910 n.17.

When the EPA orders a site to be placed on the NPL, that site becomes eligible for remedial action financed by the Superfund, although the mere listing of the site on the NPL does not mean that the EPA will take such remedial action. *See* 40 C.F.R. § 300.68(a) (1987); *Eagle-Picher I*, 759 F.2d at 911 & n.26. However, should the EPA take remedial action against a site listed on the NPL, past and present owners of the site become liable for the cost of the cleanup. 42 U.S.C. § 9607(a); *Eagle-Picher II*, 759 F.2d at 926 n.1. The initial version of the NPL was promulgated as a final rule of the EPA on September 8, 1983.[3] The list, as required by Congress, is revised to include new sites "no less often than annually." 42 U.S.C. § 9605(8)(B).

II. Facts

Northside owns and operates a 131-acre hazardous waste site near Zionsville, Indiana (the Northside site). The Northside site was included as part of the EPA's first annual revision to the NPL, which was published in the form of a proposed rule on September 8, 1983. *See* 48 Fed. Reg. 40,674-82 (1983). Pursuant to 5 U.S.C. § 553(c),[4] the EPA allowed interested parties, including

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[3] 48 Fed. Reg. 40,658 (1983). The NPL, including subsequent revisions, is codified at 40 C.F.R. Part 300, App. B (1987). The NPL is promulgated in the form of a final rule under informal notice-and-comment rulemaking procedures. *See* 42 U.S.C. § 9605; 5 U.S.C. § 553(c).

[4] Section 553(c) of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-59, 701-06 (1982 & Supp. III 1985), provides in relevant part:

> After notice required by this section, the agency shall give interested persons an opportunity to participate in

Northside, to comment upon the proposed revision, and gave them until November 7, 1983 to do so. 48 Fed. Reg. 40,674 (1983).

Despite the November 7, 1983 deadline, Northside did not comment upon its site's inclusion in the NPL revision until more than two and one-half months after the comment period had officially closed. On January 31, 1984, the EPA received from Northside 420 pages of documents consisting of various geological studies, water quality evaluations, and correspondence pertaining to the Northside site. The documents were accompanied by a letter dated January 26, 1984 from Jonathan W. Bankert, president of Northside, asking that "the Agency review these documents even though not summited [sic] by November 7, 1983 since we were not advised of that date." J.A. 516.[5] Although Bankert's letter briefly described each of the eleven separate documents Northside was submitting, the letter did not in any way comment concerning the specific relationship between any of the documents and Northside's objections to the way in which the EPA had applied the HRS when scoring the Northside site. Nor were specific statements about the relationship between the documents and the HRS contained in the documents submitted to the EPA along with Bankert's letter.

Even though Northside's comments were untimely filed, the EPA did review those comments and prepared a fourteen and one-half page response to them. *See* J.A. 469-

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> the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. . . .

[5] Despite this statement in Bankert's letter, Northside had been given notice concerning the date upon which the comment period closed because, as is indicated in the text of this opinion, that date was published in the Federal Register.

83. Because Northside had not made any specific statements about the purpose of its comments in Bankert's letter or elsewhere, the EPA was forced to make certain assumptions about the documents which Northside had submitted:

> These documents include results of geologic surveys and water quality evaluations pertaining to ground and surface water in the area around the [Northside] site. *Northside made no further specific comments, based on the documentation, regarding the scoring factors on which the HRS score for this site was based. For this reason, EPA's response addresses only major findings or conclusions presented in the documents which relate to the HRS score and subsequent listing of the site on the NPL. . . .*
>
> In general, all of the documentation which was submitted appeared related to the linking of the contaminants found in samples of surface water and in on-site wells to the landfill and to indicate contamination is more likely migrating from the Envirochem site located to the north of Northside landfill.

J.A. 470 (emphasis added).

After reviewing Northside's comments, the EPA confirmed its previous conclusion that "the site has been properly scored as proposed and is eligible for listing on the NPL." J.A. 483.[6] Accordingly, the Northside site was included in the first annual revision of the NPL when the latter was promulgated as a final rule on September 21, 1984. 49 Fed. Reg. 37,070-90 (1984).[7] Northside did not request the EPA to reconsider its

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[6] The Northside site received a score of 46.04, J.A. 483, well above the score of 28.5 required for inclusion on the NPL. The Northside site is ranked 237th out of the 703 sites listed on the current version of the NPL. 40 C.F.R. Part 300, App. B (1987).

[7] The Northside site is specifically listed at 49 Fed. Reg. 37,084 (1984).

ruling, although it had the right to do so. *See* 5 U.S.C. § 553(e).[8] Instead, Northside instituted this suit in this court to attack its inclusion on the NPL.

III. Discussion

Northside challenges the EPA's order on a variety of substantive and procedural grounds. Essentially, Northside contends that (1) the Northside site cannot be listed on the NPL because portions of that site had already been granted interim status under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-91i (1982 & Supp. III 1985); (2) the documentation in the record does not support the score which the Northside site received under the HRS; and (3) in scoring the Northside site, the EPA deviated from certain internal quality control procedures. The EPA disagrees on the merits with all of Northside's claims. Furthermore, the EPA contends that this court should refuse to consider Northside's objections because Northside failed properly to raise them during the rulemaking proceeding. We agree with the EPA that, by neglecting timely to put the EPA on proper notice of its objections, Northside has forfeited its right to have this court examine those objections on the merits.

While Northside did submit 420 pages of documents to the EPA, it made no attempt to specify *why* it considered those documents or anything in them relevant to the rulemaking procedure. Northside contends that the notice-and-comment rulemaking provisions of 5 U.S.C. § 553(c) do not require such specificity. Northside apparently believes that the mere submission of voluminous documentation to the EPA is enough to put

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[8] Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 553(e). For further discussion, see *infra* note 11.

the EPA on notice of all possible reasons why a site should not have been included on the NPL. But common sense and case law dictate that Northside should have assumed at least a modicum of responsibility for flagging the relevant issues which its documentary submissions presented. As Judge Leventhal has noted:

> [C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. *The comment cannot merely state that a particular mistake was made . . .; it must show why the mistake was of possible significance in the results [the agency reaches].*

Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied sub nom. Portland Cement Ass'n v. Administrator, EPA*, 417 U.S. 921 (1974) (emphasis added).

In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), then-Justice Rehnquist expressed the unanimous opinion of seven members of the Supreme Court[9] that a party such as Northside has the burden of clarifying its position for the EPA.[10] Even though the EPA has the stat-

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[9] Neither Justice Powell nor Justice Blackmun took part in the decision of *Vermont Yankee*.

[10] *Portland Cement* and *Vermont Yankee* arose in somewhat different contexts. *Portland Cement* involved the propriety of proposed EPA regulations under the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1982 & Supp. III 1985), regarding the standards of performance for portland cement plants. At issue in that case was an interested party's right to comment under 5 U.S.C. § 553(c) concerning the methodology which the EPA had used in establishing those standards. Justice Rehnquist's comments in *Vermont Yankee* are addressed to the application of the National Environmental Policy Act, 42 U.S.C. §§ 4321-70a (1982 & Supp. III 1985) in a licensing context and indicate the thoroughness with which the EPA must consider the environmental impact of a proposed action

utory obligation to consider fully significant comments, "it is still incumbent upon intervenors who wish to participate [in a licensing proceeding] to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions." 435 U.S. at 553. Justice Rehnquist then quoted with approval Judge Leventhal's remarks in *Portland Cement*, *id.*, and concluded that

> administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."

Id. at 553-54.

Applying those principles to Northside's petition for review, it is quite clear that Northside's comments did not alert the EPA to any of the contentions which Northside presses before us. President Bankert's transmittal letter did nothing more than list the titles of the documents enclosed with it. Neither Bankert's letter nor any of the documents submitted with it made clear the objections which Northside now contends that it was making. Indeed, as the EPA's response to Northside's comments reveals, Northside's documents lend themselves to an interpretation of Northside's objections which, although not what Northside intended, is still entirely consistent with the types of objections which a party might make when a hazardous waste site which it owns is listed on the NPL.

It is certainly incumbent upon the EPA under 5 U.S.C. § 553(c) to "respond[] in a reasoned manner to

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in the light of the comments which interested parties make about that action.

significant comments received." *United States Satellite Broadcasting Co., Inc. v. FCC*, 740 F.2d 1177, 1188 (D.C. Cir. 1984); *see also, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 & n.58 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). But the "dialogue" between administrative agencies and the public "is a two-way street." *Home Box Office*, 567 F.2d at 35. Just as "the opportunity to comment is meaningless unless the agency responds to significant points raised by the public," *id.* at 35-36 (footnote omitted), so too is the agency's opportunity to *respond* to those comments meaningless unless the interested party clearly states its position. *See Wisconsin Electric Power Co. v. Costle*, 715 F.2d 323, 326 (7th Cir. 1983) ("the rules of administrative law apply across the board, to agencies and interested parties alike").

We hold that when Northside submitted its comments to the EPA, Northside should have been specific as to why and how it thought the 420 pages of documents were relevant to the scoring of the Northside site. We are not suggesting that Northside should have commented in great detail on every study, but we do conclude that Northside could and should have done far more than it did do to alert the EPA to its positions, which would have then required and allowed the EPA fully to consider Northside's version of the facts, and to act upon them appropriately.[11] We therefore conclude

[11] At the very least, Northside itself could have pointed out those facts which it believed that the EPA had overlooked in the EPA's response to Northside's comments. Specifically, when Northside received the EPA's response to its comments, it was on notice that the EPA had not interpreted those comments as Northside evidently expected the agency would. At that point, pursuant to 5 U.S.C. § 553(e), *see* note 8, *supra*, Northside was free to petition the EPA to reconsider its position concerning those comments in the light of the specific objections which Northside now raises before this court. *See Wisconsin Electric*, 715 F.2d at 327-28. However, Northside did not take advantage of that opportunity.

that the EPA's failure to respond to the specific issues which Northside asserts were presented by its comments was neither arbitrary nor capricious. *See Home Box Office*, 567 F.2d at 35-36 n.58. We agree with the EPA that Northside never presented its objections to the agency in a way which could reasonably have permitted the agency to examine those contentions.

Because Northside did not properly present its objections to the EPA during the rulemaking process, we will not address the merits of those objections. *Eagle-Picher III*, 822 F.2d at 146; *see also, e.g., Natural Resources Defense Council, Inc. v. Thomas*, 805 F.2d 410, 427-28 (D.C. Cir. 1986); *Washington Ass'n for Television and Children v. FCC*, 712 F.2d 677, 680-82 (D.C. Cir. 1983). However, we note that were we to reach those merits, we would still deny Northside's petition for review because the EPA's decision to place the Northside site on the NPL finds ample support in the record before us. Thus, in our view, the EPA's decision was in no way arbitrary or capricious. *See Eagle-Picher I*, 759 F.2d at 921 (setting forth the standard of review for decisions concerning NPL). Accordingly, we hereby confirm our Order of March 25, 1988 affirming the EPA's placement of the Northside site on the NPL, and denying Northside's petition for review thereof. The petition is

Denied.

Received March 30, 1988 W.D.K.
United States Court of Appeals For the District of Columbia Circuit. Filed March 25, 1988. Constance L. Dupre´, Clerk.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1586 September Term, 1987

NORTHSIDE SANITARY LANDFILL, INC.
Petitioner

v.

LEE M. THOMAS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
ET. AL.
Respondents

ON PETITION FOR REVIEW OF AN ORDER OF THE ENVIRONMENTAL PROTECTION AGENCY

Before ROBINSON, AND SENTELLE, *Circuit Judges*, and KAUFMAN, *Senior District Judge**.

JUDGMENT

This cause came on for consideration on a petition for review of an order of the Environmental Protection Agency, and was briefed and argued by counsel.

Upon consideration thereof, it is

ORDERED AND ADJUDGED by the Court that the petition for review herein be and hereby is denied. The opinion of the Court will follow. It is

FURTHER ORDERED, by the Court, *sua sponte*, that Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam
For the Court

/s/ Catherine L. Bateman

Constance L. Dupre
Clerk

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*Of the United States District Court for the District of Maryland, sitting by designation pursuant to 28 U.S.C. § 294(d).

Received May 11, 1988 W.D.K.
United States Court of Appeals For the District of Columbia Circuit. Filed May 9, 1988. Constance L. Dupre´, Clerk.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1586 September Term, 1987

NORTHSIDE SANITARY LANDFILL, INC.
Petitioner

v.

LEE M. THOMAS AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY, AND U.S. ENVIRONMENTAL PROTECTION AGENCY
Respondents

ORDER

Upon consideration of the Motion of Petitioners for Extension of Time, it is

ORDERED that the motion is granted and the time within which to file a petition for rehearing and/or suggestion for rehearing *en banc* is extended for a period of 45 days from the date of issuance of the opinion of the court.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Received September 2, 1988
United States Court of Appeals For the District of Columbia Circuit. Filed August 31, 1988. Constance L. Dupre´, Clerk.

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1586 September Term, 1987

NORTHSIDE SANITARY LANDFILL, INC.,
Petitioner

v.

LEE M. THOMAS, ADMINISTRATOR,
U.S. ENVIRONMENTAL PROTECTION AGENCY
Respondent

BEFORE: Robinson and Sentelle, Circuit Judges, and Kaufman *, Senior District Judge

ORDER

Upon consideration of Appellant's Petition for Rehearing it is ORDERED, by the court, that the Petition is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: /s/ R. A. Bonner
Robert A. Bonner
Deputy Clerk

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*of the United States District Court For The District of Maryland, sitting by designation pursuant to 28 U.S.C. 294(d).

Received September 2, 1988.
United States Court of Appeals For the District of Columbia Circuit. Filed August 31, 1988. Constance L. Dupre´, Clerk.

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1586 September Term, 1987

NORTHSIDE SANITARY LANDFILL, INC.
Petitioner

v.

LEE M. THOMAS, ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
Respondent

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D.H. Ginsburg and Sentelle, Circuit Judges and Kaufman*, Senior District Judge

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full court. No member of the court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the court *en banc*, that appellant's suggestion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE´, CLERK

BY: /s/ R.A. Bonner
Robert A. Bonner
Deputy Clerk

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*of the United States District Court For The District of Maryland, sitting by designation pursuant to 28 U.S.C. 294(d).

Received April 2, 1984
United States Court of Appeals For the District of Columbia Circuit. Filed March 28, 1984. George A. Fisher, Clerk.

APPENDIX F

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2247 September Term, 1983

SCM CORPORATION

Petitioner

v.

WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY

Respondent

No. 83-2258

NORTHSIDE SANITARY LANDFILL, INC.

Petitioner

v.

WILLIAM D. RUCKELSHAUS, *et. al.*

Respondent

ORDER

On consideration of the joint motion to deconsolidate and to dismiss case No. 83-2258 from Nos. 83-2247, et al., it is

ORDERED that the aforesaid motion is granted and docket No. 83-2258 is hereby terminated.

The foregoing docket termination applies only to No. 83-2258 and the Clerk is directed to transmit forthwith to the respon-

dent a certified copy of this order in lieu of formal mandate in that case.

FOR THE COURT:

GEORGE A. FISHER, CLERK

BY: /s/ Dan M. Cathey
Daniel M. Cathey
First Deputy Clerk

APPENDIX G

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-2119

NORTHSIDE SANITARY LANDFILL, INC.,

Petitioner,

v.

LEE M. THOMAS, as the Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency,

Respondents.

Petition for Review of an Order of the
United States Environmental Protection Agency

ARGUED APRIL 4, 1986—DECIDED OCTOBER 23, 1986

Before WOOD, COFFEY, *Circuit Judges,* and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* The primary question that we will consider in addressing this petition for review of an order of the Administrator of the Environmental Protection Agency ("Administrator") denying the petitioner's hazardous waste management permit application, is whether the petitioner has standing to challenge remarks concerning the scope of closure of the petitioner's facility that were made by the Administrator during the permit denial proceedings. For the reasons stated below, we will dismiss the petition for review.

I

A. Statutory and Regulatory Provisions

The Resource Conservation and Recovery Act of 1976 ("Act"), codified as amended at 42 U.S.C. §§ 6901-6991, governs the disposal of solid waste in the United States. In particular, §§ 3001 through 3013 of the Act, codified as amended at 42 U.S.C. §§ 6921-6934, regulate hazardous waste management and disposal. Section 3005(a) of the Act, codified as amended at 42 U.S.C. § 6925(a), provides that "the Administrator shall promulgate regulations requiring each person owning or operating an existing [hazardous waste disposal] facility . . . to have a permit issued pursuant to this section." Section 3004 of the Act, codified as amended at 42 U.S.C. § 6924(a), requires that the Administrator "promulgate regulations establishing such performance standards, applicable to owners and operators of facilities for the treatment, storage, or disposal of hazardous wastes . . ., as may be necessary to protect human health and the environment."

Recognizing that the Environmental Protection Agency ("EPA") could not issue permits to all hazardous waste applicants before the effective date of the Act, Congress provided that, under § 3005(e) of the Act, the Administrator promulgate regulations that allowed the owner or operator of a hazardous waste management facility that was in existence on November 19, 1980, to file a "Part A application," and to continue hazardous waste disposal pending the final administrative action on the facility's application. The Part A application calls for minimal information concerning the nature of the applicant's business, a description of the hazardous waste management processes it employs, a specification of the types of hazardous wastes processed, stored, or disposed of at the facility, as well as maps, drawings and photographs of the facility's past, present, and future waste processing areas. *Id.* § 270.13. If the Administrator finds no reason to believe that the Part A application does not meet the disclosure requirements of *id.* § 270.13, once it has filed a Part A

application and given proper notice of hazardous waste activities, an existing facility "shall have interim status and shall be treated as having been issued a permit." 42 U.S.C. § 6925(e); 40 C.F.R. § 270.70. The operation of a facility that has been granted interim status is limited to the types of wastes, as well as the processing, storage, and disposal procedures specified in the Part A application. Under 40 C.F.R. § 270.71, the facility must comply with the operating standards set forth at 40 C.F.R. Part 265. A facility's interim status terminates either upon final administrative disposition of a permit application, 40 C.F.R. § 270.73(a), or upon failure of the operator to furnish the full information required by the Part B application, as described below.[1]

Following the approval of a facility's Part A application and the grant of interim status, the facility must file a "Part B application" with the EPA. The Part B application calls for detailed information, including chemical and physical analyses of the hazardous waste treated at the facility, a description of procedures for preventing contamination of water supplies, a determination of the applicable seismic standard for the facility, a determination whether the facility is located within a flood plain, and data relating to groundwater monitoring. *Id.* § 270.14. The applicant must also furnish information concerning its use of hazardous waste containers, storage or disposal tanks, surface impoundments, waste piles, incinerators, land treatment facilities, and landfills. *Id.* §§ 270.15-270.21. Upon successful completion of both the Part A and Part

[1] Under the 1984 amendments to the Act, a facility that had been granted interim status before November 8, 1984, shall have that status terminated on November 9, 1985, should the facility fail to apply for a final determination regarding the issuance of a permit pursuant to 42 U.S.C. § 6925(c) (Part B application) before November 9, 1985, and to certify that it is in compliance with all applicable groundwater monitoring and financial responsibility requirements. 42 U.S.C. § 6925(e)(2) (as amended by P. L. No. 98-616, 98 Stat. 3221).

B application, an operator is issued a hazardous waste permit, and is required to comply with the standards set forth in *id.* §§ 264.1-264.351 ("Part 264").

A facility that has been approved for interim status operation must prepare a written closure plan, a copy of which must be kept at the facility. *Id.* § 265.112. The purpose of the closure plan is to "protect human health and the environment, [to prevent] post-closure escape of hazardous waste, hazardous waste constituents, leachate, contaminated rainfall, to [protect against the escape] of waste decomposition products to the ground or surface waters or to the atmosphere." *Id.* § 265.111(b). Once closure has been ordered, the owner or operator of the facility must terminate operations in a manner that minimizes the need for further maintenance of the facility. *Id.* § 265.111(a).

A closure plan must "identify the steps necessary to completely or partially close the facility at any point during its intended operating life and to completely close the facility at the end of its intended operating life." *Id.* § 265.112(a). In addition, the closure plan must provide for post-closure care for a period of thirty years after the facility is closed. *Id.* § 265.117(a). Post-closure measures include ground-water monitoring, maintenance of other monitoring and waste containment systems, and periodic reporting. *Id.* § 265.117. The plan may be amended as changes in the operation of the facility so dictate. *Id.* § 112(4)(b).

The owner or operator of a hazardous waste management facility must submit a closure plan to the appropriate EPA regional administrator at least 180 days before the date the facility is expected to begin closure. *Id.* § 112(4)(c). However, if the EPA has terminated the facility's interim status and has not issued a hazardous waste permit for the facility, the closure plan must be submitted to the EPA no later than fifteen days after interim status is terminated. *Id.* § 112(4)(c)(1). The public is provided an opportunity to comment on the submitted plan. *Id.* § 112 (4)(d). The regional administrator must approve, modify,

or disapprove the closure plan within ninety days of its receipt. The owner or operator of the facility is given sixty additional days to modify or prepare a new plan should the Regional Administrator have modified or rejected the original plan. *Id.* Whatever modification or revision the Regional Administrator then makes of the operator's revised plan shall become the approved closure plan. *Id.*

Section 3005(c) of the Act, codified as amended at 42 U.S.C. § 6925(c), provides that a state environmental agency, as authorized by the Administrator pursuant to 42 U.S.C. § 6947(a), is responsible for the issuance of hazardous waste management permits. Section 3006 of the Act, codified as amended at 42 U.S.C. § 6926, provides that a state may apply to the Administrator for authority to develop and enforce a hazardous waste program "in lieu of" a federal program and federal enforcement. 40 C.F.R. §§ 271.1-271.137 ("Part 271") sets forth the requirements for authorizing state programs. Under these regulations, a state may obtain "interim authorization" in two "phases." Phase I tracks the regulations of 40 C.F.R. §§ 265.1-265.430 ("Part 265"), and authorizes the state agency to, among other things, conduct closure proceedings for interim status facilities. *See id.* § 271.28. Once a state obtains Phase I authorization, its regulations and procedures displace the federal interim status regulations. Phase II authorization allows the state to issue permits under standards corresponding to those found in Part 270, and to enforce standards corresponding to those found at Part 264.

Section 7006(b) of the Act, codified as amended at 42 U.S.C. § 6976(b), provides that "[r]eview of the Administrator's action . . . in issuing, denying, modifying, or revoking any permit . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. . . . Such review shall be in accordance with sections 701 through 706 of Title 5." If a party has been aggrieved by the action of an authorized state agen-

cy, review of the agency's decision shall be had in accordance with the applicable state regulations.

B. Facts

The petitioner, Northside Sanitary Landfill, Inc., ("Northside"), operates a landfill near Zionsville, Indiana, and provides sanitary and hazardous waste disposal services for Indianapolis and Boone County, Indiana. Northside was in existence for many years prior to the passage of the Act. On November 18, 1980, Northside submitted a Part A application to the Administrator for a hazardous waste treatment and disposal permit. As part of its application materials, Northside included a hand-drawn scale map of its facility. The map delineated five areas within Northside's property boundary.

The first, the "Old Farm" area (also called the "Past Treatment and Disposal Area" or the "West Farm"), consisted of forty acres. Northside claims that it had not used the Old Farm for the disposal of hazardous wastes after the statutory cut-off date of November 19, 1980. The Administrator disputes this claim. The second, the "East Farm Area" (also called the "Current Treatment and Disposal Area"), consisted of approximately thirty acres. Northside and the Administrator agree that hazardous wastes were disposed of in the East Farm area after November 19, 1980. The third area, composed of two tracts and designated the "Proposed Future Treatment and Disposal Area" (also called the "North Farm Area"), consisted of sixty-four acres. In its brief before this court, the Administrator acknowledged that "it appears from the record that no wastes of any kind have been disposed of in this area." The fourth area was labelled the "Storage and Treatment Tank Area." The fifth and final tract (unnamed in the application) had upon it a storage barn, repair shop, and Northside's office.

In its Part A application, Northside requested approval of a "303 acre-feet" disposal capacity. Northside maintains that the disposal capacity proposed was solely for the thir-

ty acre East Farm area. On June 9, 1982, the Region V Administrator acknowledged that Northside's application qualified it for interim status, and noted that a 303 acre-feet process design capacity has been approved for Northside's facility. On January 26, 1983, the Region V Administrator requested that Northside submit a Part B application by July 29, 1983. According to the Administrator, that application was received on August 8, 1983.

After the submission of Northside's Part B application, the Region V Administrator sent Northside three notices that the information contained in the application was deficient and, hence, the application did not comply with the applicable regulations. Northside failed by the required dates to correct the deficiencies. On April 30, 1984, Northside informed the Region V Administrator by letter that it was "official[ly]" withdrawing its Part B application. On July 25, 1984, the Region V Administrator, however, pursuant to 40 C.F.R. § 124.10, issued a notice of his tentative decision to deny Northside's permit application on the grounds that the application was deficient, did not adequately provide for the protection of groundwater, and that other "continuing environmental violations" had occurred. In accordance with 42 U.S.C. § 6974(b) and 40 C.F.R. §§ 124.11-124.12, a public hearing was held on August 28, 1984, at Zionsville, Indiana.

At the public hearing, the EPA stated that Northside's Part B application did not include closure information regarding the areas of its facility for which interim status had been granted. In response, Northside stated that the Region V Administrator had incorrectly considered the Old Farm Area as part of Northside's permit application. Northside maintained that it had sought a permit for a 303 acre-feet disposal capacity, and that this was to be located in the East Farm. Northside added that, of the thirty acres composing this area, only twelve acres had actually been used for the treatment and disposal of hazardous wastes. Northside did not, however, contest the denial of its Part B application.

On October 12, 1984, the Region V Administrator denied Northside's Part B application on the ground that Northside had failed to submit the necessary information. Pursuant to 40 C.F.R. § 270.73(a), the Region V Administrator also terminated Northside's interim status on the ground that a final administrative disposition had been made of Northside's permit application. In response to Northside's position at the public hearing, the Region V Administrator stated in his order that hazardous waste had been disposed of after November 19, 1980, in the Old Farm Area as well as the East Farm. The administrator concluded that "[t]he entire hazardous waste landfill area outlined in the November 18, 1980, Part A application must be closed. This includes the 'Old Farm Area.' " The Region V Administrator's order disallowed any further hazardous waste storage, treatment, or disposal of hazardous waste at the Northside facility. Moreover, the order required Northside to commence immediate closure proceedings under the applicable Indiana regulations.

On November 8, 1984, pursuant to 40 C.F.R. § 124.19, Northside petitioned the Administrator for review of the Region V order that denied its permit application and ordered closure. Attached to Northside's petition was a copy of its Part A application with a drawing of the facility and a copy of an aerial photograph taken of the facility on September 9, 1980. Northside also included the revised "General Facility Description" from its Part A application, which description indicated that the forty-acre Old Farm Area had not been used for hazardous waste treatment and disposal since November 1980, and that the sixty-four acre North Farm Area had never been used for hazardous waste processing. Northside claimed (both before the Administrator and before this court) that, on January 4, 1985, the Region V Administrator submitted drawings of Northside's facility to the Administrator that inaccurately depicted the areas that Northside requested the EPA consider for a hazardous waste management permit.

In its petition for review to the Administrator, Northside twice reiterated its position that it was not challenging the denial of its Part B application. It claimed, however, that the comments made by the Region V Administrator relating to the scope of closure were based upon inaccurate information and were, therefore, clearly erroneous. Although Northside, by implication, maintained that the disputed comments addressed a matter, *viz.*, closure, not appropriately a subject for permit denial proceedings, it argued that, if the Administrator nevertheless considered the comments appropriate in the context, then Northside should have an appeal as of right under 40 C.F.R. § 124.19. Finally, in an effort to challenge the disputed comments, not to challenge the denial of its Part B application *per se*, Northside stated that, "[i]f necessary for administrative appellate review, the Administrator should consider Northside's submittal an appeal from the permit decision."

On April 3, 1985, the Administrator issued an order denying Northside's petition for review of the Region V Administrator's denial of Northside's hazardous waste application. The Administrator did, however, state that the questions Northside raised regarding the areas within the (1) facility that were encompassed by its Part A and Part B permit applications and (2) that could properly be closed addressed two of:

> the most rudimentary pieces of information that go into a proper permit decision. If the permit decision does not identify where the facility is located, or how big it is, the permit decision cannot be implemented successfully regardless of the outcome of the decision. This is particularly apparent in the present case, for either including or excluding the Old Farm Area will significantly alter the area of Petitioner's landfill that is subject to the closure and post-closure requirements of the regulations.

The Administrator concluded:

> Therefore, even though . . . [Northside] has stated that it does not object to the denial of its permit, I am

> persuaded that the matter . . . [Northside] is raising is such an integral part of the permit decision that it is the kind of matter which can be reviewed under § 124.19.

The Administrator also observed that "[t]here is no review as of right from the Region's determination." Rather, "[40 C.F.R. § 124.19] clearly provides that . . . permits will not be reviewed unless the Petitioner is able to show that the permit determination is clearly erroneous or involves an exercise of discretion or policy which is important and which should be reviewed as a discretionary matter." The Administrator then concluded that, although the sort of issue Northside raised was within the ambit of 40 C.F.R. § 124.19, Northside "has not sustained its burden of showing that the permit determination is either clearly erroneous or involves an exercise of discretion or policy which warrants discretionary review."

On April 19, 1980, Northside filed a motion to reconsider with the Administrator, in which it noted that:

> [T]he issue as to whether the Old Farm Area is a part of the Part A interim site is presently being litigated before a hearing officer of the Indiana Environmental Management Board. . . . Therefore, the Region's decision, as confirmed by the Administrator's recent Order, has ruled upon an issue which the U.S. Environmental Protection Agency has delegated to the State [Environmental Management Board]. . . . This results in a denial of both procedural and substantive due process of law and affords the Petitioner no hearing at any time on the administrative determination of this issue.

On July 2, 1985, before the Administrator had ruled on the motion for reconsideration, Northside filed a petition for review with this court.

On November 27, 1985, approximately two days before briefs were to be filed with this court in support of Northside's petition for review, the Administrator denied Northside's motion for reconsideration. Although the effect of

his order was to affirm his initial order, the Administrator adopted a completely different rationale on reconsideration by holding that, because Indiana had been granted authority pursuant to 42 U.S.C. § 6926 to conduct closure proceedings for interim status permits, the comments in the Administrator's initial order regarding the scope of closure (and those comments made by the EPA and the Regional Administrator in the permit denial proceeding itself) "are without legal effect." In addition, the Administrator also noted that a parcel considered part of the facility for the purposes of a permit application need not automatically undergo closure upon a denial of the permit application.

II

A. Timeliness of Petition for Review

Northside's petition for review raises a number of jurisdictional issues; some have been considered by the parties, others have not. The first question we must decide is whether this court has jurisdiction under 42 U.S.C. § 6976(b), the judicial review provision for the Solid Waste Disposal Act, to entertain Northside's petition. Section 6976(b) provides that a petition for review must be filed with this court within ninety days from the date of the Administrator's action in issuing, denying, modifying, or revoking a permit. Northside filed the instant petition for review on July 2, 1985. This was within ninety days of the Administrator's order of April 2, 1985 denying Northside review of Region V's order, which rejected Northside's Part B application. Northside had, however, on April 19, 1985, filed a motion requesting that the Administrator reconsider his order of April 2. It was not until November 27, 1985, some five months later, that the Administrator denied the reconsideration motion.[2] Northside

[2] In the interim, both Northside and the Administrator had filed a number of motions (not concerning the issues of jurisdiction and standing) in this court in regard to Northside's petition for review.

did not, however, amend its original petition to reflect the Administrator's denial of its motion for reconsideration, which became the final administrative order on its Part B application.

On December 5, 1985, the Administrator filed a motion with this court requesting to amend the certified list of documents constituting the administrative record under review to include the November 27 order. Northside objected to the motion. On December 12, 1985, we issued an order stating that the Administrator's motion would be considered with the merits of Northside's petition. Following our order, Northside again took no action to amend its petition for review. Oral argument on Northside's petition was held on April 4, 1986, well over ninety days after the November 27, 1985, order denying reconsideration.

The limitation period set forth in § 2976(b) is jurisdictional, *see Arch Mineral Corp. v. Director*, No. 84-2633, slip op. at 2 (7th Cir. Aug. 11, 1986); *Natural Resources Defense Council v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981), and hence, we must consider the timeliness and sufficiency of Northside's petition, whether the parties have raised the issue or not. *See Bender v. Williamsport Area School District*, 106 S. Ct. 1326, 1331 (1986); *Christianson v. Colt Industries Operating Corp.*, No. 86-1145, slip op. at 8-9 (7th Cir. Aug. 19, 1986); *Foster v. Center Township, LaPorte County*, No. 85-1560, slip op. at 8 (7th Cir. Aug. 13, 1986). We shall then determine whether Northside's petition for review was premature when filed on July 2, 1985, and hence, insufficient to invoke our jurisdiction under § 2976(b). By the same token, if we find that the petition was not premature when filed, we must decide whether Northside's failure to amend the petition to reflect the Administrator's final order affected our jurisdiction.

In reviewing a petition challenging an award of benefits under the Black Lung Benefits Act, codified as amended at 30 U.S.C. §§ 901-960, we recently held that "a petition for review . . . is timely if filed within sixty days

of the . . . [Benefits Review] Board's denial of a timely *motion for reconsideration.*" *Arch Mineral*, No. 84-2633, slip op. at 8 (emphasis added). In *Arch Mineral*, we noted that "[a] clear majority of the cases involving appellate review of administrative decisions hold that, where the applicable statute and administrative regulations are silent, the filing of a motion for reconsideration suspends the time for filing a petition for review." *Id.*, slip op. at 6.

Nevertheless, *Arch Mineral* involved a statutory scheme of judicial review quite different than that presented in the instant case. 42 U.S.C. § 6976(b) provides that judicial review of the Administrator's actions "shall be in accordance with sections 701 through 706 of Title 5," that is, the Administrative Procedure Act. Section 704 provides that "[e]xcept as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for . . . any form of reconsideration." Thus, by its terms, "[t]he Administrative Procedure Act explicitly permits [a] judicial appeal and [a] request for agency reconsideration to be pursued simultaneously." *American Trucking Associations, Inc. v. ICC*, 697 F.2d 1146, 1148 n.* (D.C. Cir. 1983) (Scalia, J.). We hold, therefore, that Northside's petition for review, which was filed within ninety days of the Administrator's initial order denying review, was timely under § 6976(b) and thus sufficient to invoke our jurisdiction.[3] *See also Selco Supply*

[3] In *Arch Mineral Corp. v. Director*, No. 84-2633, slip op. at 7 (7th Cir. Aug. 11, 1986), we noted that "[i]t is obviously wasteful of the resources of the courts to burden them with objections to administrative action which may be obviated by agency action on reconsideration." Nevertheless, citing *Selco Supply Co. v. EPA*, 632 F.2d 863, 865 (10th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981), we noted that in the context of environmental legislation, the need for "prompt decisionmaking procedures that could better prevent unnecessary injury" must be taken into account. *Arch Mineral*, No. 84-2633, slip op. at 7. We cannot be unmindful at this juncture that the EPA has expressed concern about the ef-

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Co. v. EPA, 632 F.2d 863, 865 (10th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) (motion to reconsider does not toll sixty-day limit under 7 U.S.C. § 136n(b), which governs judicial review of EPA orders under the Federal Insecticide, Fungicide and Rodenticide Act, codified as amended at 7 U.S.C. §§ 135-136y).

In addition, we grant the Administrator's motion to amend the certified list of documents constituting the record on the instant petition to include the Administrator's order on reconsideration. This, however, raises the question whether Northside should have amended its original petition to reflect the Administrator's order on reconsideration. In our opinion, it was unnecessary for Northside to have done so. As noted above, § 704 permits the judicial review and administrative reconsideration of an agency's order to occur simultaneously. Once our jurisdiction has been properly invoked by a petition for review, it makes little sense to require an amendment to the petition to preserve that jurisdiction only because the agency has ruled on the motion for reconsideration. In *North American Telecommunications Association v. FCC*, 751 F.2d 207, 209 (7th Cir. 1984) (per curiam), we noted "[t]he presumption in favor of judicial reviewability of agency action . . . (on which, see, e.g., *Abbott Laboratories v.*

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[3] *continued*
fects of Northside's hazardous waste disposal on the water supply of the City of Indianapolis. Thus, the need for "prompt decisionmaking procedures" is especially strong in the instant case. In addition, under the statutory provisions relevant here, unlike those cases cited in *Arch Mineral*, there is no prescribed period in which the agency must pass upon a motion for reconsideration. *See, e.g.*, 49 U.S.C. § 10322(g)(2). In theory then, the wait for administrative action on a motion for reconsideration could be indefinite. Nor are we faced with a case in which a motion for reconsideration is the only available channel to present matters of general importance for plenary consideration by, for example, the entire Interstate Commerce Commission (as opposed to inferior panels). *See B.J. McAdams v. ICC*, 551 F.2d 1112, 1114-15 (8th Cir. 1977).

Gardner, 387 U.S. 136, 140, (1967)), implies to us that procedural rules should not lightly be interpreted to prevent a party from obtaining judicial review." We noted also that "the action of this court in accepting the transfer of the petition from [another federal circuit] may have lulled NATA [the petitioning party] into thinking that it had not filed its notice of appeal prematurely." *Id.* Our action in ordering that the Administrator's motion seeking to amend the scope of the administrative record be considered with the merits of Northside's petition might have "lulled" Northside into thinking that its petition need not be amended to reflect that order to sustain our jurisdiction. Insofar, then, the reasoning of *Citizens State Bank* is equally applicable here. *Cf. Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 182-83 (7th Cir. 1984); *Textor v. Board of Regents*, 711 F.2d 1387, 1390-91 (7th Cir. 1983).

B. Standing and Ripeness

Northside asks this court to "reverse . . . [the Administrator's order denying review], . . . the Region's permit denial, [and the] interim status . . . and closure determination[s], . . . and [to] order . . . [the Administrator] to hold a formal evidentiary hearing on said permits and closure, utilizing the Federal Rules of Evidence and the Administrative Procedure Act."[4] Northside contends that

[4] In the alternative, Northside requests that this court "hold that the Northside property subject to closure and post-closure requirements of 40 CFR Part 265 (Subpart G) is limited to the twelve acres located in its East Farm utilized for the disposal of . . . hazardous waste between November 19, 1980, and January 24, 1983." Even were we to conclude that the EPA has the authority to determine the scope of closure proceedings for interim status facilities (which we do not) and that the Region V's finding that hazardous waste had been disposed of in the Old Farm Area as well as the East Farm after the statutory cut-off date was unsupported by substantial evidence (about which we express no opinion), we may not decide *de novo* which area within the East Farm should be closed. Such a determination rests in the first in-

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observations made by the Region V Administrator in his order denying Northside's Part B application incorrectly indicated that hazardous waste had been disposed of in areas of Northside's facility other than the East Farm. Northside also contends that the Region V Administrator's conclusion that Northside's entire facility was subject to closure proceedings was based on inaccurate drawings and photographs of Northside's facility. It is Northside's position that a formal evidentiary hearing before the EPA would afford Northside an opportunity to introduce evidence of the actual extent of waste disposal and of the property within its facility properly encompassed by its Part A permit application. This, Northside concludes, would allow the EPA to redetermine the scope of closure on the basis of accurate information.

The Administrator counters that because Northside did not dispute the denial of its Part B application (nor the termination of its interim status) before the EPA, and that

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[4] *continued*

stance with the appropriate agency and we may review that agency's decision to determine whether it is supported by substantial evidence on the record. As we recently held in *Brock v. Dow Chemical, U.S.A.*, Nos. 85-2541 & 85-2545, slip op. at 10 (7th Cir. Sept. 16, 1986), "unless a matter crucial to . . . [an administrative] order falls outside the permissible bounds of choice for an agency, such that we can find it proper or improper as a matter of law, we may not uphold [or review] an order on the basis of facts or reasoning upon which the . . . [agency itself] did not expressly rely, even if such facts or reasoning are supported by substantial evidence in the record." *See also Bowen v. American Hospital Assoc.*, 106 S. Ct. 2101, 2113 (1986); *FTC v. Indiana Federation of Dentists*, 106 S. Ct. 2009, 2016 (1986); *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943); *NLRB v. Indianapolis Mack Sales & Service, Inc.*, No. 84-3061, slip op. at 7-8 (7th Cir. Sept. 25, 1986). Hence, we would have to remand to the appropriate agency for a determination as to which areas of Northside's facility must be closed. Yet, because we hold that Northside has not been (yet) injured by the disputed comments made by the EPA regarding the closure of its facility, and hence, that the petitioner's challenge is not ripe for judicial resolution, we will not reach the merits of Northside's argument in this regard.

because the State of Indiana, pursuant to 42 U.S.C. § 6926, has the sole authority to conduct proceedings relating to, and to rule on hazardous waste closure plans, Northside does not have standing to challenge the comments relating to closure that were made by the Region V Administrator in his order. In essence, the Administrator argues that because the State of Indiana, not the EPA, has the authority to determine the scope of closure proceedings in Northside's case, the disputed statements are "without legal effect." Hence, the Administrator concludes that Northside cannot demonstrate that it has suffered, or that there is an immediate danger that it will suffer, a direct personal injury as a result of the comments made by the Region V Administrator in his order denying Northside's Part B application, even if those comments are inaccurate.

Article III of the Constitution limits the power of the federal judiciary to the resolution of "cases" and "controversies." *Diamond v. Charles*, 106 S. Ct. 1697, 1703 (1986); *Bender v. Williamsport Area School District*, 106 S. Ct. 1326, 1331 (1986); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982); *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968); *see also Foster v. Center Township of LaPorte County*, No. 85-1560, slip op. at 7 (7th Cir. Aug. 13, 1986). Although the question of standing encompasses a number of prudential considerations, *see Foster*, slip op. at 7 n.9, in its constitutional dimension it is a component of the case-or-controversy requirement and, as such, bears on the power of a court to entertain a party's claim. *Valley Forge*, 454 U.S. at 471; *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 262 n.8 (1977); *Foster*, slip op. at 8; *Block v. Meese*, 793 F.2d 1303, 1307 (D.C. Cir. 1986). The analysis of standing under Article III focuses on the party bringing a claim, not on the claim itself. *Valley Forge*, 454 U.S. at 484; *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *Foster*, slip op. at 9.

In *Valley Forge*, 454 U.S. at 472, the Supreme Court set forth three requirements as the "irreducible minimum" that must be present before a party is said to have standing before a federal court: (1) the party "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)); (2) the injury "fairly can be traced to the challenged action," of the defendants (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976)); and (3) the injury "is likely to be redressed by a favorable decision," (quoting *Simon*, 426 U.S. at 41). The constitutional analysis is not altered by the fact that this action was brought under the judicial review provisions of the Solid Waste Disposal Act. *See, e.g., Center for Auto Safety v. N.H.T.S.A.*, 793 F.2d 1322, 1328-31 (D.C. Cir. 1986); *Bethlehem Steel Corp. v. EPA*, 782 F.2d 645, 651 (7th Cir. 1986). As the Supreme Court observed in *Valley Forge*, 454 U.S. at 487 n.24, "[n]either the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III."

The argument Northside advances to establish standing to bring the instant petition for review is somewhat fragmented, but nevertheless may fairly be reduced to the following contentions: (1) the EPA's disputed remarks mandate the closure of Northside's entire facility, even for the purposes of non-hazardous waste disposal, and have hence, caused Northside injury; (2) Northside has standing because it is appealing from the EPA's termination of its interim status; (3) Northside has standing because it is appealing from the EPA's denial of its Part B application; and (4) because the Indiana environmental agency has already in part accepted, and may continue to accept the EPA's recommendations as to the closure of Northside's facility without an independent exercise of its discretion and judgment, the remarks will have the effect of denying Northside an opportunity to litigate this matter before the Indiana agency. We shall consider each

of these contentions in turn. As we explain below, the first three arguments, upon analysis, fail to show that Northside has standing, and the last argument, although it affords Northside standing, is not ripe for judicial resolution.

1. Closure of Entire Facility

For the purposes of our decision, we must accept as true all material allegations of Northside's petition for review, and it will suffice if these allegations show that Northside has standing. *See, e.g., Village of Arlington Heights*, 429 U.S. at 264 n.9; *Block v. Meese*, 793 F.2d at 1307. Northside first maintains that as a result of the Region V Administrator's remarks, the entire facility, including areas in which Northside claims no hazardous wastes were disposed after the relevant statutory cut-off date, must undergo closure under Part 265, and that it will be unable to dispose of non-hazardous waste on any portion of its facility.

Northside's argument, however, fails to account for the fact that the State of Indiana has received authorization, pursuant to 42 U.S.C. § 6926, to determine the closure requirements for any facility in that state whose interim status has been terminated by the EPA. *See* 40 C.F.R. §§ 265.1(c)(4); 271.121(b). Once the state agency has received authorization for its program, it shall "carry out such program in lieu of the Federal program." 42 U.S.C. § 6926(a). The EPA simply does not have the legal authority to determine whether, for what purposes, or which areas of Northside's facility must be closed. *See* 40 C.F.R. § 265.1(c)(4). The State of Indiana alone is responsible for these determinations. Even if the EPA is dissatisfied with, for example, the enforcement action taken by a state against a specific hazardous waste disposal facility, or the settlement agreement reached between the state and the facility, so long as the state has exercised its judgment in a reasonable manner and within its statutory authority, the EPA is without authority to com-

mence an independent enforcement action or to modify the agreement. *Cf. Shell Oil Co. v. Train*, 585 F.2d 408, 414 (9th Cir. 1978) (EPA recommendation that state deny NPDES variance request constituted advice to state, and was not reviewable in federal court). Hence, in and of itself, the fact that the EPA made comments on the scope of closure in the course of denying Northside's Part B permit application does not constitute an injury to Northside.

Nor can it be said that the disputed remarks preclude the Indiana agency from deciding the issue of which areas of Northside's facility must be closed. It is only when "an administrative agency is acting in a judicial capacity and resolves disputed issues of fact *properly before it* which the parties have had an adequate opportunity to litigate," that the findings of the agency are entitled to preclusive effect. *See University of Tennessee v. Elliott*, 106 S. Ct. 3220, 3226 (1986) (quoting *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966) (emphasis added)). In the instant case, the disputed remarks of the EPA arose as responses to comments made by a representative of Northside at the public hearing held on the denial of Northside's Part B application. Participants at the hearing were allotted only five minutes to comment upon the proposed permit denial. Hence, it is clear that the parties were not given a full and fair opportunity to litigate the issue of which areas of Northside's facility were subject to closure. More important, because, as we noted above, the EPA did not have the authority to make closure findings and determinations, these issues were not properly before it. Hence, Northside cannot claim that it has been injured by the allegedly preclusive effect of the EPA's statements. *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985).

Northside argues in its reply brief that the Indiana environmental agency is not alone responsible for developing a closure plan for Northside's facility. Northside states that the Indiana agency informed it "that Northside is subject to the Phase II closure requirements set forth in

40 C.F.R. Part 264, which the state is not authorized to administer." On January 31, 1986, however, Indiana received final authorization, and "now has the responsibility for permitting treatment, storage and disposal facilities within its borders and carrying out the other aspects of the [Act]." 51 Fed. Reg. 3954 (January 21, 1986). Hence, Indiana now has authority under Phase II.

Nevertheless, Indiana's final authorization "is subject to the limitations on its authority imposed by the Hazardous and Solid Waste Amendments of 1984 (Pub. L. 98-616, November 8, 1984)." *Id.* That is, "new requirements imposed by the [1984 amendments] take effect in authorized States . . . [and the] U.S. EPA is directed to carry out those requirements and prohibitions . . ., including the issuance of full or partial Federal permits, until the State is granted authorization to do so." *Id.*; *see also* 42 U.S.C. § 6926(g)(1). Thus, "[a]s a result of . . . [the amendments], there will be a dual State/Federal regulatory program in Indiana." 52 Fed. Reg. 3954; *see also* 42 U.S.C. § 6926(c)(4). However, "[t]o the extent the authorized state program is unaffected by . . . [the amendments], the State program is authorized to operate in lieu of the Federal program." 51 Fed. Reg. 3954; *see also* 42 U.S.C. § 6926(c)(4).

Northside contends that its facility, and hence, its closure plan falls within the ambit of the 1984 amendments. Indeed, Northside notes that the Indiana agency advised it in a letter written July 11, 1985, that:

> [B]ecause of your delay in submitting a Closure/Post-Closure Plan, you have become subject to the requirements of the Hazardous and Solid Waste Amendments of 1984. Because EPA is implementing the requirements of that statute, they are the only ones who can integrate the new requirements into your . . . plan.

We note that this letter was written before the EPA issued a clarification of the effect of the 1984 amendments on July 15, 1985, and before the Indiana environmental agency received Phase II authorization on January 31, 1986.

In its amended form, 42 U.S.C. § 6925(i) provides:

> The standards concerning groundwater monitoring, unsaturated zone monitoring, and corrective action, which are applicable under Section 6924 of this title to *new* landfills, surface impoundments, land treatment units, and waste-pile units required to be permitted under subsection (c) of this section shall also apply to any landfill, surface impoundment, land treatment unit, or waste-pile unit qualifying for the authorization to operate under subsection (e) of this section which receives hazardous waste after July 26, 1982.

(emphasis added)

In addition, 42 U.S.C. § 6926(c)(4) provides:

> In the case of a State permit program for any State which is authorized under subsection (b) of this section or under this subsection, until such program is amended to reflect the amendments made by the Hazardous and Solid Waste Amendments of 1984 and such program amendments receive interim or final authorization, the [EPA] Administrator shall have the authority in such State to issue or deny permits *or those portions of permits affected by the requirements and prohibitions established by the Hazardous and Solid Waste Amendments of 1984*. The Administrator shall coordinate with States the procedures for issuing such permits.

(emphasis added)

Thus, insofar as Northside falls within the purview of the 1984 amendments, and hence, must satisfy the closure standards found at Part 264, instead of at Part 265, Indiana is authorized to administer these regulations. Yet, insofar as portions of Northside's property, and hence, of Northside's closure plan are affected by the 1984 amendments, Indiana must coordinate closure with the EPA. Pursuant to 42 U.S.C. § 6925(i), this would include standards concerning groundwater monitoring, unsaturated zone monitoring, and the necessary corrective action relating thereto.

Northside has not indicated, however, what other portions, if any, of its closure plan are affected by the 1984 amendments. More important, Northside has not suggested, nor do we find any reason on the basis of the record before us to assume, that the determination in areas in which hazardous waste has been disposed after July 26, 1982, the relevant statutory cut-off date, is entrusted to the EPA as opposed to the Indiana agency. We are also not unmindful that Northside is challenging the EPA's remarks regarding the disposal of hazardous waste on the Old Farm Area after November 19, 1980, and *not* disposal on the East Farm after July 26, 1982. Therefore, in this regard, the 1984 amendments are not relevant to Northside's challenge. Northside has not claimed, and there is no reason to assume, that the 1984 amendments give the EPA authority to determine the scope of closure. The 1984 amendments provide for coordinate authority over specific and limited aspects of hazardous waste disposal pending an approved state program. The amendments do not preempt that part of an existing state program that is relevant to the matters Northside seeks to challenge on its petition for review. Those amendments do not aid Northside in establishing that it has standing to challenge the EPA's remarks regarding the scope of closure and the areas of its facility where hazardous waste was disposed after November 19, 1980. Thus, on the basis of the record before us, the 1984 amendments are not relevant to the disposition of Northside's petition for review.

2. Termination and Interim Status

At times Northside characterizes its petition as a challenge to the denial of its Part B application and to the termination of its interim status, not merely a challenge to the EPA's remarks concerning the scope of closure. Northside asserts that it was entitled to a formal evidentiary hearing prior to the Administrator's action on its application and interim status. Insofar as Northside characterizes its petition as a challenge to the termination of

its interim status, its argument is unavailing. Section 6976(b) grants us jurisdiction only to review certain actions of the Administrator in regard to a claimant's "permit." Yet, although it imposes the same obligations on a hazardous waste management facility to comply with operational requirements as a facility actually issued a permit, 42 U.S.C. § 6925(e); 40 C.F.R. § 265.1(b), interim status is not considered a "permit" within the meaning of the judicial review provision (§ 6976(b)), and we do not have jurisdiction to review the termination of that status.[5] *Hempstead County and Nevada County Project v. EPA*, 700 F.2d 459, 462 (8th Cir. 1983).

3. Denial of Part B Application

Northside's attempt to characterize its petition as a challenge to the denial of its Part B application for a hazardous waste management permit is equally unpersuasive. First, Northside did not press this argument before either the Region V Administrator or the Administrator. Indeed, the record reflects that Northside, on several occasions, expressly disavowed that it was seeking review of the permit denial.[6] It is clear from the record that

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[5] Northside also argues that it has a property interest in continuing to operate under interim status, and that the termination of that status without a formal evidentiary hearing constitutes a deprivation of property without due process of law. This argument is unavailing. The grant of interim status to a hazardous waste management facility is expressly provisional and cannot be said to create a "claim of entitlement" to the status, *see, e.g., Cleveland Board of Education v. Loudermill*, 105 S. Ct. 1487, 1491 (1985); *Ruckelshaus v. Monsanto*, 104 S. Ct. 2862, 2873 (1984); *Campbell v. Miller*, 787 F.2d 217, 222-23 (7th Cir. 1986). Thus, Northside does not have a protected property interest in the interim status.

[6] It is true that Northside, in its petition to the Administrator for review of the Region V administrator's order, stated that, if its petition must be characterized as an appeal from the permit denial itself in order to invoke appellate administrative review, then the Administrator should so characterize it. Yet, this arose

(Footnote continued on following page)

Northside contested only the Region V Administrator's comments concerning the scope of closure and the areas of Northside's facility where hazardous wastes had been disposed of after November 19, 1980. Second, (and more important for the matter of Northside's standing before this court), even were we to order the EPA to hold an evidentiary hearing (a remedy that we cannot grant Northside), it would not redress Northside's claimed injury. By asking for an evidentiary hearing in the guise of a challenge to the permit denial, Northside in effect is asking us to order the EPA to make findings and reach conclusions regarding the scope of closure that the EPA simply does not have the authority to make. It is axiomatic, however, that a party challenging the agency action "is required to show a substantial possibility that the requested relief would benefit him in some perceptible, tangible fashion." *See, e.g., Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 715 (D.C. Cir. 1977). Northside may not rely upon the "remote possibility, unsubstantiated by allegations of fact, that . . . [its] situation might have been better had respondents acted otherwise, and might improve were the court to afford relief." *Warth v. Seldin*, 442 U.S. at 507. Hence, the fact that Northside's claimed injury, *viz.*, being subject to an overinclusive closure order due to the EPA's action, cannot be redressed by the relief Northside seeks leads to the conclusion that Northside does not have standing before this court to challenge the

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[6] *continued*
in the context of Northside's argument that the Region V administrator did not have the authority to make the disputed comments in its order denying the Part B application. In effect, Northside argued that, if the comments were appropriately made in a permit denial proceeding, then in fairness it should have an opportunity to challenge the statements before the EPA, for they would have an adverse effect on Northside's position in the state closure proceedings. Yet, we agree with Northside that the EPA did not have the legal authority to make these comments. What is important is that Northside did not, before the Administrator, base its claim to an evidentiary hearing on the argument that its Part B application was improperly denied.

EPA's remarks made during permit denial proceedings. *Larsen v. Valente*, 456 U.S. 228, 243 n.15 (1982); *Foster*, No. 85-1650, slip op. at 12; *see also Center for Auto Safety*, 793 F.2d at 1334.

4. Preclusion of State Agency's Consideration

In support of its petition for review, Northside also argues that the state agency will do nothing more than "rubber stamp" the EPA's recommendations on the scope of closure for Northside's facility. The record does reflect that, in developing a closure plan for Northside's facility, the state agency has in large part adopted the EPA's recommendations. Of course, the fact that the state agency reaches the same, or substantially the same, findings and conclusions as the Administrator is not, in and of itself, indicative of an injury to Northside *arising out of* the EPA's remarks made during Northside's permit proceedings. Nor is the EPA's conceded role in advising the state agency and cooperating with it in formulating a closure plan either necessarily, or even probably, improper. Indiana's authorization to conduct closure proceedings does not in any way preclude cooperation with the EPA. It is unwise to impose an artificial barrier between the EPA and the state in these matters, because to do so would lead to a needless duplication of efforts at the risk of decreasing the accuracy of the state's findings and actions. When the integrity of the environment and the health of the general public are at stake, such a risk cannot be accepted lightly. Moreover, even if the state's factual findings, and hence, its closure plan for Northside, prove to be unsupported by substantial evidence in the record, this does not entail, nor even suggest, that the EPA was improperly enmeshing itself in the state proceedings.

Even accepting, for the sake of argument, that the EPA's role in developing a closure plan for Northside's facility was in excess of the EPA's statutory authority, (and although this would suffice to confer standing on

Northside) the effect that may have on Northside is, at the present time, speculative at best. Our intervention at this point would be premature and unwarranted. It is well settled that a court should refrain, "through [the] avoidance of premature adjudication, from entangling . . . [itself] in abstract disagreements over administrative policies, and . . . [that a court should] protect . . . agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging part[y]." *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967); *Citizens for a Better Environment v. Costle*, 617 F.2d 851, 853-54 (D.C. Cir. 1980). In addition, under the circumstances of this case, there is no hardship to Northside in withholding consideration on this matter. *Abbott Laboratories*, 387 U.S. at 149. At oral argument, Northside conceded that it would be able to present its position before the state agency. Northside also has not suggested that the procedural safeguards afforded it at the state proceedings will be inadequate. In addition, once the state has decided upon a closure plan, review of that plan is available. Hence, by withholding judgment on this matter, we cannot be said to have insulated the issues Northside raises from review. *Abbott Laboratories*, 387 U.S. at 136; *United States Brewers Association v. EPA*, 600 F.2d 974, 979 (D.C. Cir. 1979). In conclusion, even accepting as true Northside's allegations that the Indiana environmental agency will not exercise independent judgment in developing a closure plan for Northside's facility, which would be sufficient to confer standing, until a final administrative decision is reached, Northside's claim is not ripe for judicial resolution.

Distilled to its essence, Northside's argument asks us to either determine the proper scope of closure or to order the EPA to hold a formal evidentiary hearing for it to do so. Neither is a remedy that we have the authority to grant. We do, however, caution the Administrator against commenting on the scope of closure in a case such as this where a state agency has the sole authority to

decide such matters. Even though the Administrator's comments in these regards are not legally binding on the state agency, they may give rise to delicate questions of the state agency's exercise of independent judgment. The Administrator must bear in mind the sensitive relationship existing between it and state agencies.

III

For the reasons stated above, Northside's petition for review is

DISMISSED.

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APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP 88-172-C
NORTHSIDE SANITARY LANDFILL, INC.	)	
JONATHAN W. BANKERT, and	)	
PATRICIA A. BANKERT,	)	
	)	
Defendants.	)	

ENTRY

Plaintiff, the United States, has filed a Motion For Immediate Entry to enjoin defendants, Northside Sanitary Landfill, Inc., Jonathan Bankert and Patricia Bankert, from conducting any further landfilling operations at the Northside Sanitary Landfill property. The United States claims that immediate and permanent cessation of all landfilling operations at the Northside Sanitary Landfill is necessary to enable the Environmental Protection Agency ("EPA") to effectuate a cleanup as authorized under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* Having considered the documents submitted by the parties and the testimony presented at the hearing on the motion, this Court finds that the landfilling operations at issue do not currently interfere with the EPA's cleanup activities and accordingly DENIES the United States' Motion.

MEMORANDUM

I. BACKGROUND

The Northside Sanitary Landfill ("Northside") is a 168 acre[1] solid waste disposal facility presently operated by defendant Northside Sanitary Landfill, Inc. and owned by defendants Jonathan and Patricia Bankert (Sloan dec. § 8, Vendl dec. § § 7, 8) (all defendants are hereinafter referred to collectively as "defendants"). Northside currently receives only conventional waste, but prior to February 1983 it received hazardous waste (Memorandum in opposition to Motion for Immediate Entry, Ex. 2). Due in part to chemical contamination of the soil, groundwater, and leachate at the site[2], the Environmental Protection Agency ("EPA") in September 1984 targeted Northside as a national priority site[3] for environmental cleanup under § 9605 of the Comprehensive Environmental Response, Compensation and liability Act ("CERCLA", 42 U.S.C. § 9605, also known as "superfund").

In accordance with the CERCLA statutory mandate and the related regulations[4], the EPA, after notice and comment, issued a Record of Decision ("ROD") describing the cleanup remedy to be implemented at Northside[5] (Vendl dec. § 9). The remedy selected in ROD involves restricting access to the site, covering it with a multilayer cap to prevent water infiltration, relocating adjacent creeks, and constructing leachate/groundwater treatment systems (Vendl dec. § 10).

The EPA plans to implement the remedy in three phases: (1) predesign, which includes geotechnical tests, contamination tests, mapping, and a pilot study; (2) design, including prepa-

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[1] Approximately 70 of the 168 acres have received landfill (Sloan dec. § 7).

[2] *See* Sloan dec. § 15 and Sloan dec. attachment 2.

[3] The District of Columbia Circuit Court of Appeals recently denied defendant's petition to review their inclusion on the National Priorities List. *Northside Sanitary Landfill, Inc. v. Thomas*, No. 84-1586 (D.C. Cir. Mar. 25, 1988).

[4] *See* 40 C.F.R. § 300.68 (1987).

[5] The remedy also covers an adjacent superfund site known as Environmental Conservation and Chemical Corp. (Vendl dec. § 4).

ration of engineering plans and specifications; and (3) construction (Sloan dec. § 21). Phase one, the predesign phase, has already begun, and is scheduled for completion in March 1989 (Sloan dec. § 28). Phase two, design, is to be completed by fall 1989. The final construction phase is expected to take two to five years (Sloan dec. § § 29, 30).

A consulting engineering firm, CH_2M Hill, Inc. (hereinafter the "predesign contractor"), has contracted with the EPA to perform some of the predesign work. To date, the EPA and the predesign contractor have accomplished the predesign work while landfill operations are ongoing. Recently, however, the EPA began to contend that additional landfilling would interfere with proper completion of the predesign tasks. Pursuant to this contention, in November 1987 the EPA wrote to the defendants informing them that the predesign work would soon require permanent closure of the Northside facility (Vendl dec. § 11). In January 1988 the parties met to discuss the need for closure and the progress of the predesign work generally, but could not reach an agreement on cessation of landfilling operations (Vendl dec. § § 17, 18). Unable to negotiate a closure at Northside, the EPA seeks an Order compelling closure, alleging, under 42 U.S.C. § 9604(e)(5)(b), that the defendants' continued operation of the landfill is an interference with the EPA's statutorily authorized entry at the site.

In response, defendants challenge the EPA's authority to seek closure under CERCLA, arguing that the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6926, gives the State of Indiana exclusive jurisdiction over any closure plan applicable to Northside. To support their argument, defendants point out that the United States delegated RCRA authority to the State, and that the State ordered Northside to implement a RCRA closure plan which includes remedial systems similar to those required under the CERCLA plan[6] (Def. Ex. S). The RCRA order is currently

[6] For a thorough discussion of Northside's dealings with the EPA and the State of Indiana under RCRA, *see Northside Sanitary Landfill, Inc. v. Thomas*, 804 F.2d 371 (7th Cir. 1986).

stayed, with resolution pending in the Indiana courts (Def. Ex. O).

In addition to their RCRA argument, the defendants maintain that the closure sought in the motion at bar constitutes an unconstitutional taking, that the entry requested is arbitrary and capricious, and that the EPA has failed to show that the continued landfilling with interfere with the CERCLA cleanup plan.

II. DISCUSSION

A. Scope of Review

To determine the proper nature of the judicial inquiry into this alphabet soup litigation, this Court must first reconcile two seemingly contradictory sections of CERCLA. The EPA maintains that § 9613(h) controls the Court's scope of review, while the defendants claim 42 U.S.C. § 9604(e)(5) controls. When the statutes are read together, it is clear that this Court can obey the strictures of § 9613(h) yet fulfill the statutory analysis required in § 9604(e)(5).

Section 9613(h) reads, in pertinent part,

> "No federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under section 9604 of this title . . . in any action except one of the following:
>
> (1) An action under section 9607 of this title to recover response costs . . .
>
> (2) An action to enforce an order under [the abatement section of CERCLA] or to recover a penalty for violation of such order
>
> (3) An action for reimbursement [from the superfund for compliance with an order] . . .
>
> (4) [a citizen's suit]
>
> (5) An action under section 9606 of this title in which the United States has moved to compel

remedial action." 42 U.S.C.A. 9613(h) (West 1986 Supp.)

The relevant part of § 9604(e)(5)(B) reads:

> "The [EPA] may ask the Attorney General to commence a civil action to compel compliance with a request or order [for entry onto a hazardous waste facility]. Where there is a reasonable basis to believe there may be a release or threat of a release of a hazardous substance or pollutant or contaminant, the court shall take the following actions:
>
> (i) In the case of interference with entry or inspection, the court shall enjoin such interference or direct compliance with orders to prohibit interference with entry or inspection unless under the circumstances of the case the demand for entry or inspection is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C.A. § 9604(e)(5)(B) (West 1986 Supp.).

There is little case law to guide this Court in determining the proper scope of review, because both of the statutory sections quoted *supra* were only recently adopted. *See* Superfund Amendments and Reauthorization Act of 1986 ("SARA") Pub.L. No. 99-499, 100 Stat. 1617. One of the few relevant opinions is *Dickerson v. Administrator of the EPA*, 834 F.2d 974 (11th Cir. 1987). in *Dickerson*, the defendant property owners sought relief from a district court order which granted the EPA the authority to enter the defendant's property to commence a cleanup response. The appeals court found that § 9613(h) precluded any review of the proposed cleanup action, noting that judicial review is available only *after* the cleanup, during the cost recovery stage of the proceedings. *Id.* at 977; *see* 42 U.S.C. § 9607.

Under § 9613(h) and *Dickerson*, this Court may not examine the technical merit of a CERCLA response decision. Accordingly, this Court will not consider any evidence or arguments

relating to the scientific aspects of the Northside cleanup plan[7]. Notwithstanding that limitation, when the EPA seeks court-ordered compliance with an entry request, the district court hearing the motion is charged in § 9604(e)(5) with ensuring that the five statutory elements for court-ordered compliance are met.

First, the entry sought must be authorized under paragraphs (2), (3) or (4) of § 9604(e). *See* 42 U.S.C. § 9604(e)(5)(A). In the case at bar, the EPA's entry at Northside to effectuate a cleanup is authorized under paragraph 3. 42 U.S.C. § 9604(e)(3)(D). That authority, however, is not plenary, for the second element of the statute requires the EPA to request the landowner's consent to entry before seeking court-ordered compliance. 42 U.S.C. § 9604(e)(5)(A). Here, the EPA fulfilled this requirement in November 1987 by a letter informing defendants of the need for closure and in January 1988 by discussion closure with defendants' attorneys (*see* Vendl dec. § § 11, 17).[8]

The third element of the statute requires the EPA to demontrate there is a reasonable basis to believe there may be a release of a hazardous substance, pollutant or contaminant from the site. 42 U.S.C. § 9604(e)(5)(B). Foruth, there must be some interference with the entry request before the court may

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[7] The parties presented considerable evidence on the desirability of filling a depression in the contours of the landfill with garbage before constructing the cap, and on the differences between the RCRA and CERCLA cleanup plans. Those topics are matters of agency expertise and are not subject to judicial review at this stage in the proceedings.

[8] The defendants contend that the EPA may not seek court-ordered compliance unless and until they (the EPA) have issued an administrative order directing compliance. This contention is not supported by he statutory language. Section 9604(e)(5)(B) allows the EPA to seek a court order "to compel compliance with a request *or* order" (emphasis added). Congress's use of the disjunctive indicates that a formal administrative order is not a prerequisite to court-ordered compliance. For an exhaustive consideration of this statutory interpretation, see *U.S. v. Charles George Trucking Co.*, mem.op. 85-2463-WD (D. Mass. Mar. 31, 1988).

order compliance." 42 U.S.C. § 9604(e)(5)(B)(i). And fifth, the demand for entry must not be arbitrary, capricious or an abuse of discretion. *Id.* at ii.

Given these elements of § 9604(e)(5), the issues for this Court's review are:

(1) Whether the EPA has demonstrated there is a reasonable basis to believe there may be a release or a threat of a release of any hazardous substance or pollutant or contaminant from the Northside facility; and,

(2) whether continued landfilling at Northside constitutes an interference with the EPA's authority to enter the site to effectuate a response; or

(3) whether the EPA's demand for closure of Northside is arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law.

B. Reasonable Basis For Belief There May Be A Release

Compounds which are considered hazardous substances, pollutants or contaminants[10] are designated as such in CERCLA and the related regulations. *See* 42 U.S.C.A. § 9601(14) (West 1986 Supp.). Under CERCLA, a "release" of these substances is broadly defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment". 42 U.S.C.A. § 9601(22) (West 1986 Supp.). Thus, if the EPA has shown that any hazardous substance may leach or escape from the landfill, or that there is a threat that such

[9] The EPA frames its entry request to include cessation of the landfilling activities. In so framing the request, the EPA combines the entry element of the statute with the interference element. In order to properly review each element, this Court must separate the EPA's general entry request from the contention that landfilling operations are an interference with the entry.

[10] For the purposes of this opinion, hazardous substances, pollutants and contaminants can be described collectively as "CERCLA substances".

a substance will leach or escape, they have overcome the first hurdle in obtaining immediate closure.

While the danger posed by the *possible* release of CERCLA substances from Northside may be *minimal*, the EPA has shown that there is a reasonable basis to believe there may be a release of such substances from the site at some future date. The Northside feasibility study discusses the threat of exposure to leachate *sediment*, and summarizing that threat states, "it is possible that contaminant types and levels *may increase* or decrease in the future. (Stipulated Admission of Feasibility Study, p. 1-18; see also Def. Ex. J) (emphasis added).

To counter this evidence on the threat of release, defendants first point to a statement by the EPA's Remedial Project Manager. The Project Manager, when asked in September 1987 if continuation of Northside's landfilling operation would cause environmental harm, answered that disposal of municipal waste would not do a lot of harm (tr. 30; and Def. Ex. B). However, the inquiry at bar is not whether there *will be* environmental harm, but is whether there may be *a threat* of harm from the release of a CERCLA substance. The Project Manager's statement does not undermine the reasonableness of the EPA's belief, based on the feasibility study, that there may be a release of CERCLA substances from Northside.

C. Interfeences With Cleanup

1. Interference defined

The term "interference" is not defined in the CERCLA statute. To properly apply the term to the analysis of the instant case, this Court must examine the evidence in light of the statute's overall purpose. Where, as here, the courts and Congress agree that the overarching purpose of the statute is quick remedial action in cleaning up hazardous waste sites[11],

[11] *See, eg.*, S.Rep. No. 11, 99th Cong., 1st Sess. at 58; *Wheaton Industries v. EPA*, 781 F.2d 354, 356 (4th Cir. 1986).

and the evidence presented relates primarily to prolonging the cleanup process, the term "interference" may be interpreted to mean conduct which could delay the cleanup schedule. Thus, in keeping within the confines of the statutory language, the statutory intent, and the parties' concerns, the narrow factual issue before this Court is whether immediate closure of the Northside landfill is necessary to prevent a delay in effectuating the CERCLA response at the site.

2. Related cases

The fact-sensitive nature of this case distinguishes it from the cases cited by the EPA to support the motion for immediate entry. The EPA relies primarily on *U.S. v. Charles George Trucking Co., Inc.*, No. 85-2463 (D.Mass., March 31, 1988). In *Charles George*, the defendants refused to allow the EPA access to the site, claiming that the remedial work planned by the EPA would prevent them (the defendants) from developing an on-site methane recovery system. The EPA countered that without immediate access, the cleanup process would be delayed, which would in turn require major modifications in the construction plan and exacerbate existing environmental problems at the site. *Id.* at 7-8. Judge Woodlock granted the EPA immediate entry to the site, but in his order specifically stated that the defendants could pursue their plans to develop the methane recovery system. The language of the order emphasizes that the central concern in § 9604(e)(5) cases is delay:

> "nothing in this Order shall be interpreted as preventing the defendants from attempting to develop a landfill methane recovery system at the Site provided that the development of such a system is coordinated with the [EPA's] implementation of the [cleanup]*and in no way interferes with the expeditious implementation of the [cleanup]. U.S. v. Charles George Trucking Co., Inc.*, No. 85-2463, Order dated March 31, 1988, § 16 (D.Mass. 1988) (emphasis added).

The landowners in a second case cited by the EPA, *U.S. v. Western Processing, Inc.*, No. C83-252M (W.D.Wash. Nov. 3, 1986), like the landowner in *Charles George*, had prevented the

EPA coming onto their property. In *Western Processing*, the EPA sought to perform soil testing on the property. Reasoning that entry for the purpose of soil testing was authorized under § 9604(e)(3), the *Western Processing* court granted the EPA aaccess to the property. No. C83-252M, p. 5. The court also noted that according to the legislative history of § 9604(e)(5)(B), it could review only the reasonableness of the EPA's belief as to the possibility of a release of CERCLA substances from the site, and could not review the merits of the cleanup response plan. No. C83-252M, p. 5. Similarly, the court in *U.S. v. Long*, No. C-1-87-167 (W.D. OH, May 13, 1987) and *U.S. v. Iron Mountain Mines, Inc.*, No. S-87-1189 (E.D. CA, Sept. 18, 1987) limited their respective reviews of the EPA requests for entry to the "reasonable belief of release" issue.

The Court in the aforementioned cases did not discuss the issue of interference. The absence of such discussions highlights the distinction between those cases and the case at bar. In *Charles George*, *Western Processing*, *Long* and *Iron Mountain*, the defendants had apparently[12] physically excluded the EPA from the relevant sites. The courts thus did not reach the factual interference issue.

Such is not the case here: the defendants have consistently permitted employees of the EPA and the predesign contractor to do on-site work[13] (tr. 107). Moreoever, the defendants in January 1988 granted the EPA access to the site to the extent access did not require closure (vendl dec. attchmnt 1). While the scope of review is very narrow in actions under § 9604(e)(5), to refuse to consider the facts presented by the defendants in the case at bar relevant to the interference allegation would be to ignore the express language of the statute. Congress instructed the courts to order compliance with EPA entry request "in the case of *interference* with entry". 42 U.S.C.A.

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[12] The circumstances of the respective defendants' positions were not clearly set out in any of the cases.

[13] The sole exception to permissive access occurred when the predesign contractor's employees arrived unannounced at the site late one Sunday afternoon (tr. 110-113).

§ 9604(e)(5)(B)(i) (West 1986 Supp.) (emphasis supplied). This Court cannot determine whether this is a case of interference with entry unless it considers the evidence of the alleged interference.

3. Evidence of Interference

The EPA offers four arguments to support its contention that the landfill operations interfere with the cleanup response schedule. First, one of the EPA's witnesses testified that the mud and dust created by trucks entering and exiting the site make field work difficult (tr. 84). Second, the same witness testified that continued truck traffic made it difficult to isolate contaminated zones at the site. Nothing in the record indicates that either of these two "difficulties" has any effect on the EPA's ability to adhere to the cleanup response schedule. To the contrary, the Site Manager for the predesign contractor testified that his crews were currently working around the dust and traffic (tr. 84, 85, 86).

The EPA further contends that truck traffic on the access road interferes with the installation of on-site utility lines needed to operate the predesign contractor's trailers (tr. 89). However, on cross-examination, the contractor's site manager admitted that the lines could easily be routed through existing culverts (tr. 131), so that traffic on the access road would not interfere with the utility hookups.

The EPA presses most forcefully its fourth interference argument: continued landfill operations will alter the contours of the four acre "notch" area which is still receiving landfill, making the predesign topographic maps of the site inaccurate and obsolete for use in the design phase of the cleanup (tr. 43). In support of this argument, the EPA points out that aerial photography is a necessary step in producing topographic maps (Chatfield dec. § 7), and that proper aerial photographs can be taken only when there is no foliage on the surrounding trees (Chatfield dec. § 8). Citing the need for unobstructed photography, the EPA insists in its motion and pretrial memorandum that landfill operations must cease by early spring of

1988, so that the contours of the site will remain unchanged once the early spring photographs are taken.

Initially, the EPA maintained that absent court-ordered closure it had two options: either defer topographic mapping until at least late fall of 1988, or, proceed with the potography and mapping, then repeat the process for the changed portion of the site once landfilling operations cease (Memorandum In Support Of Immediate Entry, p. 10). The first option, according to the EPA, "would delay implementation of the remedy substantially". *Id.* The second option, remapping any changed areas, "would result in less delay but increased costs". *Id.* At the hearing, the EPA's witness announced that the earial photographs had been taken (tr. 42), so consideration of the interference caused by the first option is now moot. This Court accordingly turns to whether the process of remapping the notch area at Northside will interfere with scheduled completion of the predesign portion of the overall cleanup response.

As previously stated, the EPA argues that the situation is urgent due to the coming of springtime foliage. However, the EPA presented no evidence even tending to show the existence of trees anywhere near the notch area which would obstruct aerial photography. In fact, the testimony indicated that there are no trees growing in the notch area (Tr. 178, 54)[14]. Without proof of the existence of trees, the EPA's primary argument for immediate closure fails.

Even assuming springtime foliage does limit the timing of aerial photography, the evidence indicates that the EPA could rephotograph the notch area in the fall of 1988 without any delay in the overall cleanup schedule. (Sloan dec. § 28). The timetable covering the various predesign projects indicates that although mapping is to be completed by May 1988, the remainder of the predesign work will not be done until March 1989 (Sloan dec. attchmnt 3; also appearing as Def. Ex. I).

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[14] One witness initially indicated there might be some trees at the southwest corner of the notch (Tr. 53), but later stated that the only trees which would impede photography were along a creek on the periphery of the site (Tr. 54).

Further, the site manager testified that none of the design work will begin until all the predesign work is complete (Sloan aff. § 29, tr. 67). Accordingly, so long as the final maps are completed in time for the map information to be incorporated into the predesign reports, a postponement of the mapping work will not cause any delay in the predesign or design process. The record indicates that the final maps can be completed in time without an immeduiate halt in landfilling. The defendants' expert testified that the total time involved in remapping the notch area is only two days (tr. 146, 154). The time allowed in the predesign timetable for the new map information into the relevant predesign reports is about 120 days (Sloan dec. attchmnt 3). Thus, if the final maps are updated by September 1988 to reflect any changes in the contours of the notch area[15] resulting from continued landfilling, the predesign staff will have ample time to generate the necessary reports by the original predesign completion date of March 1989.

Three other factors weigh against granting the Motion for Immediate Entry. First, the cost of remapping is nominal, estimated at between $1,000 (tr. 147) and $8,000 (Def. Ex. E). Second, the process of remapping will not alter the accuracy of the maps (tr. 148). Third, one of the defendant's experts explained that even if landfilling operations ceased today, natural processes will cause the contours of the site to change significantly before the predesign work is complete (tr. 175, 177). As the EPA has convincingly argued, such changes in contour will necessitate remapping, leading to the conclusion that regardless of landfill operations the entire area will have to be remapped shortly before design work begins (*see* tr. 155).

In summary, nothing in the record illustrates that the EPA's current plan for closure will be delayed in any way by defendant's continued operation of a sanitary landfill. Until the EPA offers some proof that immediate closure is required to effectuate the cleanup response in accordance with the established schedule, this Court cannot compel Northside to close.

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[15] Should trees (for some reason not reflected in the record) obstruct aerial photography of the notch, ground surveying for remapping purposes is an acceptable alternative to aerial photography (tr. 145).

C. Other Statutory Elements

Having determined that landfilling operations do not currently constitute an interference with the Northside cleanup plan, this Court need not address the other elements of § 9604(e)(5).

D. Dual Authority of RCRA and CERCLA

The defendants contend that the State of Indiana has exclusive jurisdiction over the Northside closure under the Resource Conservation and Recovery Act, 42 U.S.C. § 6926. While this argument is unlikely to withstand legal analysis[16], such analysis is unnecessary in the case at bar because Indiana, in its Order compelling Northside closure under RCRA, expressly stated "Nothing in this Order shall relieve Northside from any responsibility imposed under the Comprehensive Environmental Response Compensation and Liability Act" (Def. Ex. S, p. 104).

DATED this 12th day of April, 1988.

/s/ Larry J. McKinney
LARRY J. McKINNEY, JUDGE
United States District Court
Southern District of Indiana

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[16] *See U.S. v. Charles George Trucking Co.*, 823 F.2d 685, 686 (1st Cir. 1987) (The EPA has dual authority under RCRA and CERCLA).

APPENDIX I

Appendix B of 40 C.F.R. Part 300 is amended by adding the following cites to the National Priorities List:

Group V:

Rank	Reg EPA	ST	Site Name	City/County	Response Status
215	05	IN	Northside Sanitary Landfill, Inc.	Zionsville	E

49 Fed. Reg. 37070 at 37082 and 37084, September 21, 1984.

APPENDIX J

Relevant portions of EPA Preamble to 40 C.F.R. Part 300 amending Appendix b, (National Priorities List) 48 Fed. Register 40674 at 40675 September 8, 1983.

"Proposed Additions" consist of sites not currently on the NPL that the Agency is proposing to add to the NPL. The "Proposed Additions" for this update are those contained in the list immediately following this preamble discussion. The Agency is requesting public comment on whether it is appropriate to add these sites to the final NPL, and may recalculate site scores based on comments received during the comment period.

EPA requests public comment on each of the sites it is proposing to add to the NPL, and will accept such comments for 60 days following the date of this notice. A "Documentation Record" and HRS scoring sheets for all proposed sites are available for inspection and copying in the NPL docket located in Washington, D.C. These documents are also available in the EPA Regional Offices, as are background data referred to in the Documentation Records and relied on for scoring. In some instances, where States calculated site scores and EPA review and quality control checking did not require direct inspection of background data, these data may be available only from the State that conducted the original scoring. After considering the relevant comments received during the comment period and determining the final score for each proposed site, the Agency will add to the current NPL at the time of the next update all sites that meet EPA's criteria for listing.

APPENDIX K

Relevant portion of EPA Preamble entitled "V. Contents of the NPL" to 40 C.F.R. Part 300 amending Appendix B (National Priorities List), 48 Fed. Register 40658 at 40662 and 40663, September 8, 1983 subtitled "RCRA-Related Sites"

RCRA-Related Sites

Both CERCLA and the Resource Conservation and Recovery Act (RCRA) contain authorities applicable to hazardous waste facilities. These authorities overlap for certain sites. Accordingly, where a site consists of regulated units of a RCRA facility operating pursuant to a permit or interim status, it will not be included on the NPL but will instead by addressed under the authorities of RCRA. The Land Disposal Regulations under RCRA (40 CFR Parts 122, 260, 264, and 265) give EPA and the States authority to control active sites through a broad program which includes monitoring, compliance inspections, penalties for violations, and requirements for post closure plans and financial responsibility. RCRA regulations require a contingency plan for each facility. The regulations also contain Groundwater Protection Standards (40 CFR Part 264 Subpart F) that cover detection monitoring, compliance monitoring (if ground water impacts are identified) and corrective action.

These monitoring and corrective action standards apply to all "regulated units" of RCRA facilities, i.e., any part of the waste treatment, storage, or disposal operatioin within the boundaries of the facility that accepted waste after January 26, 1983, the effective date of the Land Disposal Regulations (47 FR 32349, July 26, 1982). Even if the unit ceases operation after this time, the unit is still required to be covered by a permit and the monitoring and corrective action requirements will be enforced. Given this alternative authority to ensure cleanup, regulated units of RCRA facilities generally are not included on the NPL. This is true not only of sites subject to EPA-administered hazardous waste programs but also to sites

in States that administer programs approved by EPA. Even in the latter instance, close Federal control is ensured by the comprehensiveness of the program elements required of all State programs coupled with EPA's authority to enforce State program requirements directly if the State fails to do so. Only if the facility is abandoned and the RCRA corrective action requirements cannot be enforced will EPA consider listing the site on the NPL for possible response under CERCLA. EPA does, however, consider eligible for listing on the NPL those RCRA facilities at which a significant portion of the release appears to come from "non-regulated units" of the facility, that is, portions of the facility that ceased operation prior to January 26, 1983.

APPENDIX L

Relevant portions of EPA's Preamble to 40 C.F.R. Part 300, Appendix B (National Priorities List) as published at 49 Fed. Reg. 37070, 37072-37075, 37077, 37078, 37080, and 37082.

SUMMARY: The Environmental Protection Agency ("EPA") is amending the National Oil and Hazardous Substances Contingency Plan ("NCP"), which was promulgated on July 16, 1982, pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") and Executive Order 12316. This document amends the National Priorities List ("NPL"), which was promulgated as Appendix B of the NCP on September 8, 1983. CERCLA requires that the NCP include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, and contaminants throughout the United States, and that the list be revised at least annually. The NPL constitutes this list and is being revised to meet those requirements.

DATES: The promulgation date for this amendment to the NCP shall be September 21, 1984. Under section 305 of CERCLA, amendments to the NCP cannot take effect until Congress has had at least 60 "calendar days of continuous session" from the date of promulgation in which to review the amended Plan. Since the actual length of this review period may be affected by Congressional action, it is not possible at this time to specify a date on which the NPL will become effective. Therefore, EPA will publish a **Federal Register** notice at the end of the review period announcing the effective date of this NPL. EPA notes, however, that the legal effect of a Congressional veto pursuant to section 305 has been placed in question by the recent decision, *Immigration and Naturalization Service* v. *Chadha*, 103 S. Ct. 2764 (1983). Nonetheless, the Agency has decided, as a matter of policy, to submit the NPL for Congressional review. If, however, public health or environmental concerns indicate the necessity for the Agency to initiate remedial action at any of the sites that have been placed on

the NPL before the expiration of the time period specified in section 305, such actions will be taken.

IV. Process for Establishing the NPL

Section 105(8) of the CERCLA contemplates that the States will identify the majority of candidate sites for the NPL according to EPA criteria, although EPA also has independent authority to consider sites for listing. For that reason, most of the sites on the NPL were evaluated by the States in accordance with the HRS and submitted to EPA. In some cases, however, EPA Regional Offices, independent of these State efforts, scored other sites using the HRS. For all sites considered for this update of the NPL, including those scored by the States, EPA reviewed the HRS evaluations and conducted quality assurance audits. These audits are intended to ensure accuracy and consistency in HRS scoring among the various EPA and State offices.

On September 8, 1983, EPA proposed the first revision to the NPL in the **Federal Register** (48 FR 40674). Of the 133 sites proposed, 131 had received HRS scores of 28.50 or higher; one site was designated by the State as its top priority and, according to CERCLA, must be included among the top 100 sites; and one site was proposed for listing on the basis of a future NCP amendment which will delineate additional criteria for listing sites on the NPL. The cutoff score of 28.50 points was the same cutoff chosen for the initial NPL (see 47 FR 58476, December 30, 1982, and 48 FR 40658, September 8, 1983). The cutoff score was selected because it would yield an initial NPL of at least 400 sites as suggested by CERCLA, not because of any determination that sites scoring less than 28.50 did not present a significant risk to human health, welfare or the environment.

The public comment period on the proposed rule ended November 8, 1983. EPA considered all comments received by March 30, 1984. Based on the comments received on the September 8, 1983, proposed rule, as well as further investigation by EPA and the States, EPA recalculated the HRS scores for individual sites where appropriate. EPA's response to public

comments and explanations of any score changes made as a result of such comments, are addressed in the "Support Document for the Revised National Priorities List — 1984." This document is available for review in the EPA dockets in Washington, DC and the Regional Offices.

One commenter disagreed with EPA's approach for selecting sites for the NPL update. The commenter was concerned over the lack of a permanent and consistent rationale for the NPL cutoff score of 28.50. The commenter said that the threshold should be based on risk, not on the need to include a specified number of sites. The commenter suggested that EPA should begin to address this issue for long-range planning purposes in its implementation of CERCLA. The commenter expressed concern that EPA and others may "erroneously assume there is an automatic need to continually replenish the list." The commenter said that if sites posing minimal or non-existent risks continue to be added to the NPL, the public could be misled about the nature of the risks, and unnecessary demands could be placed on public and private resources.

In response, EPA selected the 28.50 score for the initial NPL because it would yield a list of at least 400 sites as required in section 105(8)(B) of CERCLA. The decision to retain the 28.50 cutoff score for the first update was based on the absence of any scientific evidence of an alternative HRS threshold score. EPA has not made a determination that sites scoring less than 28.50 do not present a significant risk to human health, welfare, or the environment.

The HRS was designed to use information such as that collected during a site inspection in order to allow EPA to include sites which have not been extensively investigated. As stated in the Preamble to the NCP (47 FR 31188), the requirements of section 105(8)(A) of CERCLA to list national priorities would not be met if EPA waited until extensive information has been generated for all releases. Consequently, the HRS does not measure absolute risks associated with a site. EPA believes that such a risk assessment would require

significantly greater time and funds than are presently required for placing a site on the NPL. The HRS does distinguish relative risks among sites and does identify sites that appear to present a significant risk to public health, welfare, or the environment.

A much more detailed investigation is conducted following a site's listing on the NPL. Decisions on the type and extent of actions to be taken at these sites are made in accordance with the criteria contained in subpart F of the NCP. These more detailed studies would determine if sites posing minimal or nonexistent risks had been included on the NPL. In response to the commenter's concerns, EPA could conclude after further analysis that no action is needed at such a site because it does not present a significant threat to public health, welfare, or the environment.

EPA has initiated a preliminary study to characterize the potential threats from sites that score below the cutoff score of 28.50. Generally, these are sites that potentially affect fewer people, or where there is less opportunity for exposure. EPA has acknowledged that in limited circumstances it may be appropriate to consider other criteria than simply a sufficiently high HRS total score for purposes of listing sites on the NPL. These criteria, described in the Preamble to the first NPL update (48 FR 40676, September 8, 1983) were the basis for proposing the Quail Run Mobile Manor, Missouri site for inclusion on the NPL. Although the NCP does not currently include provisions to add sites on the basis of these criteria, EPA intends to modify the NCP in such a way that Quail Run and other similar sites will qualify for the NPL.

EPA considered several alternatives for adding sites to the NPL: (1) Maintaining the size of the list at approximately 400 sites by raising the threshold HRS score and removing lower-scoring sites from the list; (2) allowing the list to expand in a limited way by raising the threshold score but not removing lower-scoring sites from the list; and (3) maintaining the threshold score of 28.50 and allowing the size of the NPL to be

determined by the number of sites exceeding the threshold score. EPA selected the third approach in order to be consistent at all sites and to give equal treatment to all interested parties. EPA's decision was not based on a need to replenish the list. The list is growing because EPA and the States continue to identify candidates as a result of their investigative programs.

Some commenters stated that certain specific sites not included in the September 8, 1983, proposed rule should be on the NPL. EPA and States are evaluating those sites and will propose any sites that meet EPA's criteria in future updates.

RCRA Sites

As stated in EPA's previous NPL rulemaking (48 FR 40658, September 8, 1983), both CERCLA and the Resource Conservation and Recovery Act (RCRA) contain authorities applicable to hazardous waste facilities. These authorities overlap for certain sites. Accordingly, where a site consists only of regulated units of a RCRA facility operating pursuant to a permit or interim status, it will not be included on the NPL but will instead be addressed under the authorities of RCRA except as provided in the paragraph that follows. The Land Disposal Regulations under RCRA (40 CFR Parts 122, 260, 264, and 265) gives EPA and the States authority to control active sites through a broad program which includes monitoring, compliance inspections, penalties for violations, and requirements for postclosure plans and financial responsibility. RCRA regulations require a contingency plan for each facility. The regulations also contain ground water protection standards (40 CFR Part 264 Subpart F) that cover detection monitoring, compliance monitoring (if ground water impacts are identified) and corrective action for releases within the boundaries.

These monitoring and corrective action standards apply to all "regulated units" of RCRA facilities, i.e., any part of the waste treatment, storage, or disposal operation within the boundaries of the facility that accepted waste after January 26, 1983, the effective date of the Land Disposal Regulations (47

FR 32349, July 26, 1982). Even if the unit ceases operation after this time, EPA has the authority to require it to obtain a permit, and the monitoring and corrective action requirements could therefore be enforced by this mechanism. Given this alternative authority to ensure cleanup, regulated units of RCRA facilities generally are not included on the NPL. If the facility is abandoned or lacks sufficient resources and the RCRA corrective action requirements cannot be enforced, EPA will consider listing the site on the NPL for possible response under CERCLA. This policy is applicable not only to sites subject to EPA-administered hazardous waste programs but also to sites in States that administer programs approved by EPA. In the latter instance, close Federal control-is ensured by the comprehensiveness of the program elements required of all State programs along with EPA's authority to enforce State program requirements directly if the State fails to do so. EPA does, however, consider eligible for listing on the NPL those RCRA facilities where a significant portion of the release appears to come from "non-regulated units" of the facility (that is, portions that ceased operation prior to January 26, 1983).

VII. Changes From the Proposed NPL

The Agency received a total of 128 commemts on the proposed NPL update. Of these, 112 comments pertained to 50 of the proposed sites. The remainder of the comments addressed sites that were not proposed or generic or technical issues that were not site specific. General comments on the NPL are addressed throughout this preamble. Significant comments regarding specific sites are addressed in the "Support Document for the Revised National Priorities List—1984." A number of the site-specific comments addressed similar issues, and EPA's rationale for addressing those issues is presented in this section. Many of the issues raised in comments are the same as those raised previously and discussed in the previous final rulemaking on the NPL (48 FR 40658, September 8, 1983). The Agency's positions on these issues remains unchanged.

Summary of Score Changes

For the 133 sites proposed on September 8, 1983, a total of 14 HRS scores changed on the basis of the Agency's reviews of comments and other information (Table 1). For 12 sites, the changes had no effect on listing; however, some of these changes resulted in the site being placed in different groups. For two sites, final HRS scores were below 28.50 and the sites will not be included on the NPL at this time. For four sites, the Agency is still considering the comments received.

Rescoring Sites

EPA expects that updates to the NPL will be solely for the purposes of adding sites to or deleting sites from the NPL. The current EPA position, which will serve as guidance for individual listing and deletion decisions, is that EPA will not rescore sites that previously had been placed on the NPL.

Several commenters presented suggestions to the contrary. Some recommended that EPA revise HRS scores periodically to reflect the results of cleanup activities, and suggested deleting any site whose HRS score dropped below the cutoff. Other commenters pointed out that new data gathered on a site might alter previous assumptions in scoring, and suggested continual rescoring to reflect any new data for purposes of adjusting a site's position on the list or deleting it if the score fell below the cutoff.

Another commenter suggested that EPA reevaluate all HRS scores, preferably after a thorough site investigation. The commenter said that this process would help assure that sites most in need of remedy would be identified and that the process would allow the deletion of sites placed on the list due to scoring based on incorrect facts.

EPA believes that the current approach of scoring by EPA or the States, EPA quality assurance review, public comment on the scoring, and EPA review of the comments provides adequate safeguards against incorrect site scores. EPA's experience to date indicates that very few scores, if any, would be

lowered sufficiently to remove sites from the NPL if EPA were to do as the commenter suggests. On the other hand, many site scores would increase somewhat if the commenters' approach were followed. Moreover, the alternative recommended by the commenter would signficantly increase the time and resources needed to develop the NPL.

EPA believes that a number of important factors support its current position that site on the final NPL should not be rescored for future updates. With respect to sites where response actions have been taken, the HRS was not designed to reflect completeness of cleanup, and therefore should not be used as a tool for deleting sites from the list or altering their relative ranking based on response actions. If response actions were taken into account in scoring, the lower HRS score that results might not reflect a commensurate reduction in the endangerment presented by the site. The result might be to delete sites where cleanups have not been completed, thereby removing incentives for further response and giving incentives for selecting cleanups primarily designed to result in score reductions as opposed to risk reductions.

In addition to the foregoing reasons, other considerations justify the current position not to rescore sites after final listing. These considerations apply not only to cleanup situations but also to situations where a score might be affected by new information about a site or by detection of an error in the original calculations. The process established by EPA for developing the NPL is comprehensive, involving initial scoring, public proposal, consideration of public comment, reexamination of data and scores, final score calculation, and inclusion on the final NPL. Given this level of scrutiny, and the time and expense involved in scoring sites, EPA finds it necessary to rely upon the interested public to identify factors pertinent to HRS score in a timely manner. EPA believes that it is appropriate to consider inclusion of a site on the final NPL to end the scoring process.

APPENDIX M

Relevant portion of 40 C.F.R. Part 300, Appendix A, entitled "Uncontrolled Hazardous Waste Site Ranking System: A User's Manual"

APPENDIX A—UNCONTROLLED HAZARDOUS WASTE SITE RANKING SYSTEM: A USERS MANUAL

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1.0 Introduction

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) (Pub. L. 96-510) requires the President to identify the 400 facilities in the nation warranting the highest priority for remedial action. In order to set the priorities, CERCLA requires that criteria be established based on relative risk or danger, taking into account the population at risk; the hazardous potential of the substances at a facility; the potential for contamination of drinking water supplies, for direct human contact, and for destruction of sensitive ecosystems; and other appropriate factors.

This document describes the Hazard Ranking System (HRS) to be used in evaluating the relative potential of uncontrolled hazardous substances facilities to cause health or safety problems, or ecological or environmental damage. Detailed instructions for using the HRS are given in the following sections. Uniform application of the ranking system in each State will permit EPA to identify those releases of hazardous substances that pose the greatest hazard to humans or the environment. However, the HRS by itself cannot establish priorities for the allocation of funds for remedial action. The HRS is a means for applying uniform technical judgment regarding the potential hazards presented by a facility relative to other facilities. It does not address the feasibility, desirability, or degree of cleanup required. Neither does it deal with the readiness or ability of a State to carry out such remedial action as may be indicated, or to meet other conditions prescribed in CERCLA.

The HRS assigns three scores to a hazardous facility:

- S_{μ} reflects the potential for harm to humans or the environment from migration of a hazardous substance away from the facility by routes involving ground water, surface water, or air. It is a composite of separate scores for each of the three routes.

- S_{m} reflects the potential for harm from substances that can explode or cause fires.

• S_x reflects the potential for harm from direct contact with hazardous substances at the facility (i.e., no migration need be involved).

The score for each hazard mode (migration, fire and explosion and direct contact) or route is obtained by considering a set of factors that characterize the potential of the facility to cause harm (Table 1). Each factor is assigned a numerical value (on a scale of 0 to 3, 5 or 8) according to prescribed guidelines. This value is then multiplied by a weighting factor yielding the factor score. The factor scores are then combined: scores within a factor category are added; then the total scores for each factor category are multiplied together to develop a score for ground water, surface water, air, fire and explosion, and direct contact.

2.0 Using the Hazard Ranking System — General Considerations

Use of the HRS requires considerable information about the facility, its surroundings, the hazardous substances present, and the geological character of the area down to the aquifers that may be at risk. Figure 1 illustrates a format for recording general information regarding the facility being evaluated. It can also serve as a cover sheet for the work sheets used in the evaluation.

Where there are no data for a factor, it should be assigned a value of zero. However, if a factor with no data is the only factor in a category (e.g., containment), then the factor is given a score of 1. If data are lacking for more than one factor in connection with the evaluation of either S_{gw}, S_{uw}, S_s, S_{rg}, or S_{DC}, that route score is set at zero.

The following sections give detailed instructions and guidance for rating a facility. Each section begins with a work sheet designed to conform to the sequence of steps required to perform the rating. Guidance for evaluating each of the factors then follows. Using the guidance provided, attempt to assign a score for each of the three possible migration routes. Bear in

mind that if data are missing for more than one factor in connection with the evaluation of a route, then you must set that route score at 0 (i.e., there is no need to assign scores to factors in a route that will be set at 0).

3.0 Ground Water Migration Route

3.1 *Observed Release.* If there is direct evidence of release of a substance of concern from a facility to ground water, enter a score of 45 on line 1 of the work sheet for the ground water route (Figure 2); then you need not evaluate route characteristics and containment factors (lines 2 and 3). Direct evidence of release must be analytical. If a contaminant is measured (regardless of frequency) in ground water or in a well in the vicinity of the facility at a significantly (in terms of demonstrating that a release has occurred, not in terms of potential effects) higher level than the background level, then quantitative evidence exists, and a release has been observed. Qualitative evidence of release (e.g., an oily or otherwise objectionable taste or smell in well water) constitutes direct evidence only if it can be confirmed that it results from a release at the facility in question. If a release has been observed, proceed to "3.4 *Waste Characteristics*" to continue scoring. If direct evidence is lacking, enter a value of 0 on line 1 and continue the scoring procedure by evaluating *Route Characteristics*.

3.2 *Route Characteristics. Depth to aquifer of concern* is measured vertically from the lowest point of the hazardous substances to the highest seasonal level of the saturated zone of the aquifer of concern (Figure 3). This factor is one indicator of the ease with which a pollutant from the facility could migrate to ground water. Assign a value as follows:

Distance (feet)	Assigned value
> 150	0
76 to 150	1
21 to 75	2
0 to 20	3

3.5 *Targets. Ground water use* indicates the nature of the use made of ground water drawn from the aquifer of concern within 3 miles of the hazardous substance, including the geographical extent of the measurable concentration in the aquifer. Assign a value using the following guidance:

Ground water use	Assigned value
Unusable (e.g., extremely saline aquifer, extremely low yield, etc.)	0
Commercial, industrial or irrigation and another water source presently available; not used, but usable	1
Drinking water with municipal water from alternate unthreatened sources presently available (i.e., minimal hookup requirements); or commercial, industrial or irrigation with no other water source presently available	2
Drinking water; no municipal water from alternate unthreatened sources presently available	3

Distance to nearest well and population served have been combined in the matrix below to better reflect the important relationship between the distance of a population from hazardous substances and the size of the population served by ground water that might be contaminated by those substances. To determine the overall value for this combined factor, score each individually as discussed below. Match the individual values assigned with the values in the matrix for the total score.

Value for population served	Value for distance to nearest well				
	0	1	2	3	4
0	0	0	0	0	0
1	0	4	6	8	10
2	0	8	12	16	20
3	0	12	18	24	30
4	0	16	24	32	35
5	0	20	30	35	40

Distance to nearest well is measured from the hazardous substance (not the facility boundary) to the nearest well that draws water from the aquifer of concern. If the actual distance

to the nearest well is unknown, use the distance between the hazardous substance and the nearest occupied building not served by a public water supply (e.g., a farmhouse). If a discontinuity in the aquifer occurs between the hazardous substance and all wells, give this factor a score of 0, except where it can be shown that the contaminant is likely to migrate beyond the discontinuity. Figure 6 illustrates how the distance should be measured. Assign a value using the following guidance:

Distance	Assigned value
> 3 miles	0
2 to 3 miles	1
1 to 2 miles	2
2001 feet to 1 mile	3
< 2000 feet	4

Population served by ground water is an indicator of the population at risk, which includes residents as well as others who would regularly use the water such as workers in factories or offices and students. Include employees in restaurants, motels, or campgrounds but exclude customers and travelers passing through the area in autos, buses, or trains. If aerial photography is used, and residents are known to use ground water, assume each dwelling unit has 3.8 residents. Where ground water is used for irrigation, convert to population by assuming 1.5 persons per acre of irrigated land. The well or wells of concern must be within three miles of the hazardous substances, including the area of known aquifer contamination, but the "population served" need not be. Likewise, people within three miles who do not use water from the aquifer of concern are not to be counted. Assign a value as follows:

Population	Assigned value
0	0
1 to 100	1
101 to 1,000	2
1,001 to 3,000	3
3,001 to 10,000	4
> 10,000	5

Supreme Court, U.S.
FILED
FEB 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1035

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

NORTHSIDE SANITARY LANDFILL, INC., PETITIONER

v.

WILLIAM K. REILLY, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that petitioner was precluded from raising on appeal certain objections to the listing of its landfill site on the National Priorities List, which is a prerequisite to remedial action paid by the "Superfund," because the objections had not been properly presented to the United States Environmental Protection Agency (EPA) during the administrative rulemaking process.

2. Whether the EPA's decision to include petitioner's landfill site on the National Priorities List was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1035

NORTHSIDE SANITARY LANDFILL, INC., PETITIONER

v.

WILLIAM K. REILLY, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 849 F.2d 1516.

JURISDICTION

The judgment of the court of appeals (Pet. App. A12-A13) was entered on March 25, 1988. A petition for rehearing was denied on August 31, 1988 (Pet. App. A15-A16). The petition for a writ of certiorari was filed on December 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

(CERCLA), 42 U.S.C. 9601-9657 (1982 ed. & Supp. IV 1986), in response to increasing public concern over the dangers to human health and the environment from sites containing harmful substances. CERCLA authorizes the United States Environmental Protection Agency (EPA)[1] to respond to actual and threatened releases of "hazardous substances" and those "pollutants or contaminants" the release of which may present "an imminent and substantial danger to the public health or welfare." Sec. 104, 42 U.S.C. 9604. It also establishes a fund (the Superfund) to pay for response actions taken by the EPA. Sec. 111, 42 U.S.C. 9611. The EPA developed the Hazard Ranking System to rank the relative danger posed by contaminated sites. 40 C.F.R. Pt. 300, App. A. A Hazard Ranking System score represents an estimate of the "probability and magnitude of harm to the human population or sensitive environment from exposure to hazardous substances as a result of contamination of ground water, surface water, or air." 47 Fed. Reg. 31,187 (1982).[2]

Sites receiving a Hazard Ranking System score of 28.50 or greater are included on the National Priorities List. 48 Fed. Reg. 40,658, 40,660 (1983). The National Priorities List serves "primarily informational purposes, identifying for the States and the public those facilities and sites or other releases which appear to warrant remedial actions. Inclusion of a facility or site on the list does not in itself reflect a judgment of the activities of its owner or

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[1] Although Congress conferred the authority for administering CERCLA on the President, most of that authority has since been delegated to the EPA Administrator. See Exec. Order No. 12,316, 46 Fed. Reg. 42,237 (1981); Exec. Order No. 12,580, 52 Fed. Reg. 2,923 (1987).

[2] The Hazard Ranking System model for scoring sites was upheld by the District of Columbia Circuit in *Eagle-Picher Industries, Inc.* v. *EPA*, 759 F.2d 905 (1985).

operator, it does not require those persons to undertake any action, nor does it assign liability to any person. Subsequent government action in the form of remedial actions or enforcement action [is] necessary in order to do so, and these actions [are] attended by all appropriate procedural safeguards." S. Rep. No. 848, 96th Cong., 2d Sess. 60 (1980), *reprinted in* 1 Senate Comm. on Environment & Public Works, 97th Cong., 2d Sess., *A Legislative History of the Comprehensive Environmental Response, Compensation, & Liability Act of 1980* at 367 (Comm. Print 1983). A facility must be listed on the National Priorities List before any Superfund-financed remedial action can be undertaken at the site.[3] 47 Fed. Reg. 31,192 (1982); see 40 C.F.R. 300.66(c)(2) and 300.68(a). That is the only substantive effect of listing a nonfederal site on the National Priorities List.[4]

2. Petitioner Northside Sanitary Landfill, Inc., operates a landfill near Zionsville, Indiana, that was included on the EPA's first annual update to the National Priorities List, which was published as a proposed rule in September 1983. 48 Fed. Reg. 40,674-40,682 (1983). The Northside site received a Hazard Ranking System score of 46.04, well above the 28.50 cutoff point for inclusion on

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[3] The response actions authorized by CERCLA include both "removal" and "remedial" actions. Removal actions generally are interim measures necessary to prevent, minimize, or mitigate damage to human health or the environment. Sec. 101(23), 42 U.S.C. 9601(23). Remedial actions are those associated with a long-term or permanent remedy. Sec. 101(24), 42 U.S.C. 9601(24). Listing on the National Priorities List is not a prerequisite to removal actions, remedial action taken by private parties, or enforcement actions under Section 106 of CERCLA, 42 U.S.C. 9606.

[4] The listing of a site owned or operated by the United States or its agencies triggers additional requirements under Section 120 of CERCLA, 42 U.S.C. 9620 (Supp. IV 1986). Petitioner's site is privately owned and operated and therefore is not subject to Section 120.

the National Priorities List. The EPA gave interested parties 60 days to submit comments on the proposed National Priorities List update. *Id.* at 40,674.

Petitioner did not submit comments on the proposed listing of its site on the National Priorities List until more than two-and-a-half months after expiration of the comment period. Its "comments" consisted of 420 pages of geological studies, water quality evaluations, and correspondence relating to the Northside site, accompanied by a letter from petitioner's president requesting that "the Agency review these documents even though not summited [*sic*] by November 7, 1983, since we were not advised of that date." The letter briefly described the 11 documents submitted by petitioner, but did not identify the issues that petitioner believed were raised by the documents or specify petitioner's objections to the manner in which the EPA had applied the Hazard Ranking System in scoring its landfill site. Pet. App. A5.

Although petitioner's "comments" were not timely filed and did not allege any specific deficiencies in the scoring process, the EPA reviewed the documents petitioner submitted and wrote a 14-page response to the argument they appeared to raise, which was that the contamination found in surface water and wells near petitioner's landfill site was most likely caused by another hazardous site. The EPA did not alter its conclusion that the Northside site had been properly scored and should be listed on the National Priorities List. Pet. App. A6. Accordingly, the site was included on the first National Priorities List update, which was promulgated as a final rule in September 1984. 49 Fed. Reg. 37,070-37,090 (1984).

3. In the court of appeals, petitioner attempted to challenge the listing of its site on the National Priorities List by arguing, among other things, that (1) the EPA's

listing of the site violated the agency's policy regarding the inclusion on the National Priorities List of sites that are regulated pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901-6991 (1982 ed. & Supp. IV 1986); (2) that the EPA's scoring of the site under the Hazard Ranking System was not adequately documented and not supported by the record evidence; and (3) that the EPA failed to review and conduct quality assurance audits on documentation relied upon by the State of Indiana in scoring the site. The court of appeals denied the petition for review, concluding that petitioner was barred from raising these objections for the first time in court in support of its petition for review (Pet. App. A7-A11). The court found that "by neglecting timely to put the EPA on proper notice of its objections, Northside has forfeited its right to have this court examine those objections on the merits" (*id.* at A7).

The court of appeals noted that while petitioner belatedly submitted 420 pages of documents as "comments" on the proposal to list its site on the National Priorities List, "it made no attempt to specify *why* it considered those documents or anything in them relevant to the rulemaking proceeding" (Pet. App. A7 (emphasis in original)). The court rejected petitioner's argument that the notice-and-comment rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. 553(c), do not require such specificity, and instead concluded that "common sense and case law dictate that Northside should have assumed at least a modicum of responsibility for flagging the relevant issues which its documentary submissions presented" (Pet. App. A8). After full briefing and a review of the record in this case, the court found that neither the transmittal letter from the company's president nor any of the submitted documents "made clear the objections which Northside now contends that it was making" (*id.* at A9). The court found it to be "quite clear that Northside's com-

ments did not alert the EPA to any of the contentions which Northside presses before us" (*ibid.*).

Because of its conclusion that "Northside did not properly present its objections to the EPA during the rulemaking process," the court of appeals found it unnecessary to address the merits of those objections (Pet. App. A11). However, the court stated that, on the merits, it would "still deny Northside's petition for review because the EPA's decision to place the Northside site on the [National Priorities List] finds ample support in the record * * * [and] was in no way arbitrary or capricious" (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 18-21) that a party cannot be precluded from raising for the first time in a reviewing court issues that it never presented to the agency in the underlying administrative proceedings unless the governing statute either expressly provides for the exclusion of such issues or provides a right to an adjudicatory hearing. This contention is incorrect. The rule that a party is barred from challenging agency action in court based on objections that it never presented to the agency at the administrative level is derived from the general principle of administrative law that exhaustion of administrative remedies is required. See *McKart* v. *United States*, 395 U.S. 185, 193 (1969) ("[t]he doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law"); *Safir* v. *Kreps*, 551 F.2d 447, 452 (D.C. Cir.) ("exhaustion * * * is a generally recognized common law principle"), cert. denied, 434 U.S. 820 (1977). Accordingly, the rule has been applied even where the governing statute was not found to contain any express limitation on a party's subsequent ability to raise issues not presented to the agency, and the party challenging agency action did not participate in a hearing. See

Glass Packaging Institute v. *Regan,* 737 F.2d 1083, 1093 (D.C. Cir.), cert. denied, 469 U.S. 1035 (1984); *National R.R. Passenger Corp.* v. *ICC,* 610 F.2d 881, 887 n.27 (D.C. Cir. 1979); *American Iron & Steel Institute* v. *EPA,* 526 F.2d 1027, 1050 (3d Cir. 1975), cert. denied, 435 U.S. 914 (1978). Indeed, in a case almost identical to the present one, the District of Columbia Circuit held that an issue not raised before the EPA in the public comment period on a National Priorities List site could not be raised in a subsequent judicial challenge. *Eagle-Picher Industries, Inc.* v. *EPA,* 822 F.2d 132, 146 & n.78 (1987).

Correspondingly, in *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519 (1978), this Court ruled that parties participating in an administrative proceeding must "structure their participation so that it is meaningful, so that it alerts the agency to [their] position and contentions" (*id.* at 553). The Court admonished that "administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.' " *Id.* at 553-554. Contrary to petitioner's suggestion (Pet. 19), the Court's conclusion in *Vermont Yankee* that an intervenor was precluded from raising certain arguments was not based on the prior availability of an adjudicatory hearing, but rather on the fact that the intervenor "decline[d] to further focus its contentions, [and] virtually declined to participate" before the agency. 435 U.S. at 554.

While petitioner attempts (Pet. 19-20) to distinguish that case on the basis of its submission of 420 pages of documents to the EPA as "comments" on the proposed listing of its site, the critical factor relied upon by the court

of appeals here was that, as in *Vermont Yankee,* petitioner failed to specify the particular objections it sought to raise through those documents (Pet. App. A9-A10). Petitioner attempts to shift the burden to the EPA, suggesting that the agency should have requested clarification of its comments (Pet. 19, 21). However, *Vermont Yankee* makes clear that it is incumbent upon the party challenging agency action to adequately apprise the agency of its position and contentions (435 U.S. at 553). In light of its receipt of a total of 5,838 pages of comments on the 140 sites proposed for listing on the first National Priorities List update and the fact that inclusion on the List is merely a first step in the remedial process, the EPA could hardly be expected to have made inquiries of individual commenters to insure that their comments had been properly articulated.

2. Petitioner also argues (Pet. 13-18) that it was not given sufficient notice that the EPA was considering the Northside site for placement on the National Priorities List, and attempts to invoke the Fifth Circuit's statement that a person "who wishes to protect himself from arbitrary agency action" should not have to "become a faithful reader of the notices of proposed rulemaking published each day in the *Federal Register.*" *City of Seabrook* v. *EPA,* 659 F.2d 1349, 1360-1361 (1981), cert. denied, 459 U.S. 822 (1982).[5] There is no basis for that complaint.

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[5] Contrary to petitioner's suggestion, the *City of Seabrook* decision is plainly distinguishable from the decision below. In that case, the Fifth Circuit recognized that a party challenging an administrative rulemaking determination cannot merely assert that there was no evidence to support the agency's conclusion, but "must at least articulate some reason why the agency's actions may be arbitrary or capricious" (659 F.2d at 1360). The court concluded that, under the circumstances presented there, the petitioners should not be estopped from raising an objection not raised clearly during the notice and comment period because it found that other objections that the petitioners

Even if petitioner could not fairly be charged with knowledge that its site had been listed in the proposed update to the National Priorities List because that proposal had been published in the Federal Register in September 1983, it in fact learned that the EPA had proposed to add its site to the List. Although its comments in response were not timely filed, the EPA considered them before issuing its final rule.

Petitioner also complains that it never received the EPA's 14-page response to its submission, which the EPA did not publish in the Federal Register but instead referenced at the time it published its final rule. Petitioner suggests that it is unreasonable to expect it to have asked for a copy of that response, and then, upon determining that the EPA had not fully understood its objections, to have asked for reconsideration of the EPA's decision. There is no merit at all to that argument. Since petitioner had learned that its site had been proposed for inclusion on the National Priorities List and had submitted documents in response, it did not have to comb the Federal Register, as it suggests, but merely had to be alert for publication of the EPA's final rule, review it, and take appropriate action at that time. That is not a particularly burdensome requirement to impose on a company that operates a landfill that has been determined to be hazardous.[6]

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had made, together with the express language of the governing statute, provided the agency with "sufficient notice" of the issue (*id.* at 1361). The court below properly reached a contrary conclusion on the facts of this case.

[6] Petitioner also errs by complaining (Pet. 15) that the EPA had not expressly provided for reconsideration of its final rule, making it "impossible" for it to seek reconsideration. The Administrative Procedure Act provides that agencies must give interested persons the right to petition for repeal of a final rule (5 U.S.C. 553(e)), and the EPA presumably would have followed the law if petitioner had invoked it.

3. Petitioner also reasserts (Pet. 21-24) one of its substantive objections to the EPA's decision to list its site on the National Priorities List by contending that, in listing the Northside site, the EPA violated its own policy against listing sites that are regulated pursuant to RCRA. As we have noted, the court of appeals found it unnecessary to address the merits of petitioner's objections because of its failure to properly preserve those issues for judical review. Accordingly, petitioner's challenge to the agency's decision on the merits is not properly presented for review by this Court.

In any event, there is no merit to petitioner's contention. As it points out, in the final rule on the original National Priorities List, the EPA adopted a general policy of not listing those RCRA facilities consisting solely of "regulated units," *i.e.*, units that are subject to RCRA land disposal regulations (Pet. App. A63).[7] However, the EPA also stressed that it would continue to include on the National Priorities List those RCRA facilities at which "a significant portion of the release appears to come from 'nonregulated units' of the facility"—*i.e.*, units that ceased operation prior to the January 1983 effective date of the RCRA land disposal regulations (*id.* at A64, A70). In this case, the EPA reasonably concluded that the Northside site fell within the latter category, and therefore should be

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[7] The preamble to the final rule on the original National Priorities List makes clear that this was intended to be only a statement of policy: "Given this alternative authority to ensure cleanup, regulated units of RCRA facilities *generally* are not included on the NPL." Pet. App. A63 (emphasis added). It is well established that such policy statements are not binding rules, but allow for the exercise of informed discretion. *Mada-Luna* v. *Fitzpatrick*, 813 F.2d 1006, 1013 (9th Cir. 1987), and cases cited; *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537-538 (D.C. Cir. 1986); *Pacific Gas & Electric Co.* v. *FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974).

included on the National Priorities List, on the basis of evidence contained in the rulemaking record which showed that a sizable portion of the Northside facility known as the West Farm or Old Farm had ceased accepting hazardous wastes for disposal prior to the effective date of the RCRA land disposal regulations. Review of this evidentiary issue by this Court would not be warranted even if it were otherwise properly presented.

4. Petitioner also contends (Pet. 24-28) that the court of appeals' decision amounted to a "rubber-stamp" of the EPA's determination to list its landfill site on the National Priorities List. In light of petitioner's procedural default, the court of appeals had no occasion to reach the merits of that determination at all. However, as we have noted, the court of appeals did state that the EPA's decision to place the Northside site on the National Priorities List was amply supported by the record and was not arbitrary or capricious. Furthermore, since review of EPA rulemaking pursuant to CERCLA, such as the listing of sites on the National Priorities List, is committed exclusively to the District of Columbia Circuit by Section 113(a) of CERCLA, 42 U.S.C. 9613(a), no possibility of a conflict among the circuits exists with respect to such issues.[8]

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[8] The District of Columbia Circuit has upheld the EPA's decisions to add sites to the National Priorities List in the only other reported cases. *City of Stoughton* v. *EPA*, 858 F.2d 747, 749-756 (1988); *Eagle-Picher Industries, Inc.* v. *EPA*, 822 F.2d 132, 137-151 (1987).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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